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IN THE SUPREME COURT OF THE UNITED STATES

No. 546

Office Supreme

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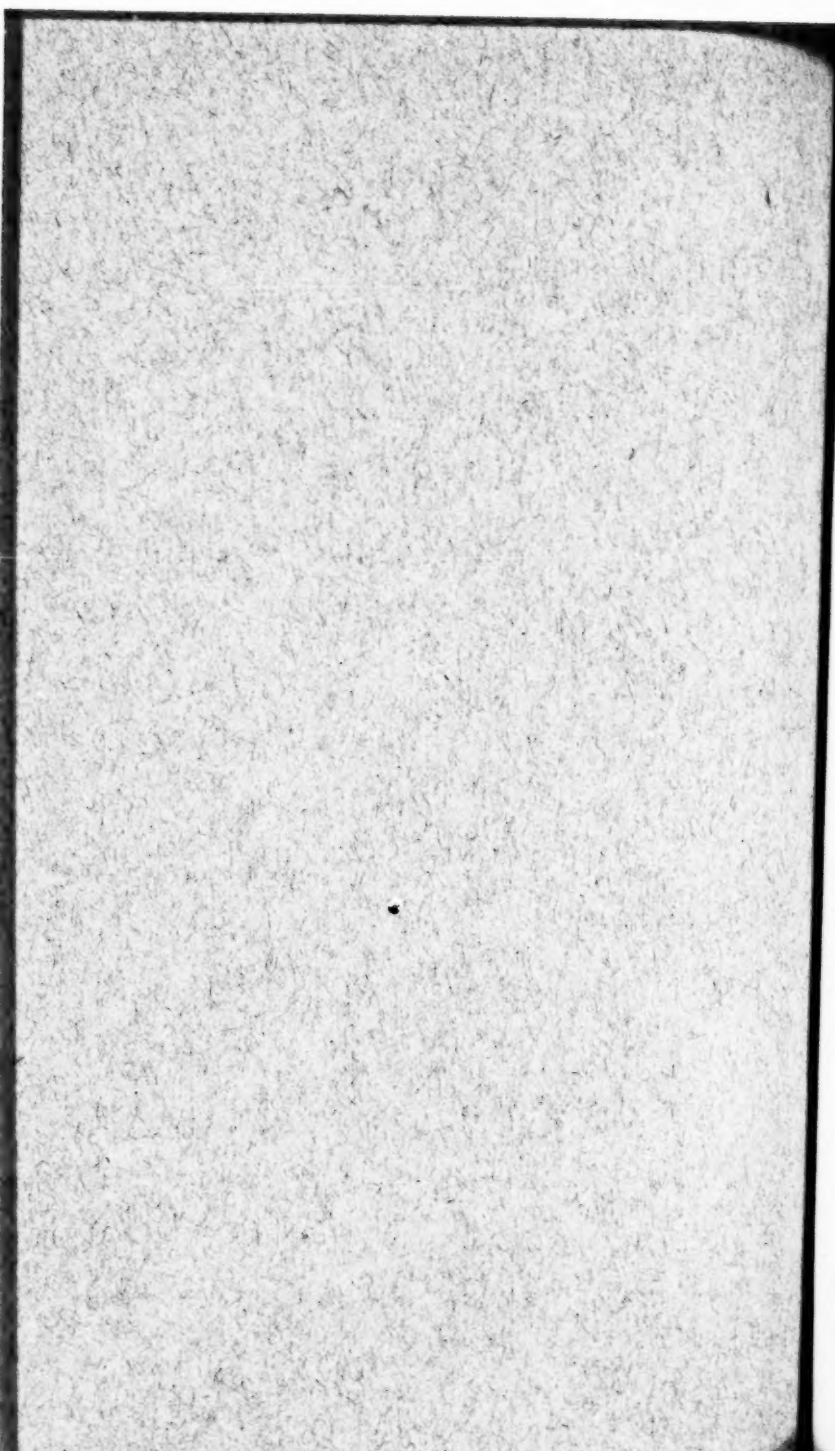
MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.
Appellant,

VS.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

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GEORGE ANDERSON,
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Solicitors for Appellant.



IN THE SUPREME COURT OF THE UNITED STATES

No. 1103.

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Appellees.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decree of the District Court for the Southern District of Mississippi, which enjoined the city of Vicksburg from constructing a municipal waterworks system before the expiration in November, 1916, of the franchise held by the private corporation which now furnishes water to the city and its inhabitants. This case is part of a long-continued and much confused controversy which has existed between the City of Vicksburg and the Vicksburg Water Works Company during the past twelve years, and as the principal question arising on this appeal is one of res adjudicata, it is essential that a brief outline of the litigation be given.

By an ordinance approved November 19, 1886, the City of Vicksburg granted to Samuel R. Bullock and Company, their associates, successors and assigns, the

“exclusive right and privilege for the period of
thirty years * * * of erecting, maintaining
and operating a system of waterworks in accordance
with the terms and provisions of this ordinance, and

of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be in its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use."

An option was given the city to purchase the waterworks system to be erected, at an appraised valuation "at the expiration of each period of ten years after this ordinance takes effect." The entire franchise will be found set out in the transcript of record, but the above is all that is material to the decision of this cause. The waterworks system thus provided for was constructed, and finally passed into the ownership of the Vicksburg Water Works Company. On March 9, 1900, the legislature of Mississippi authorized the issuance of \$150,000.00 of bonds with which "to purchase or construct, equip and maintain, a waterworks system." On November 7, 1900, the Mayor and Aldermen of the city of Vicksburg adopted a resolution declaring that the franchise held by the Vicksburg Water Works Company was no longer binding, and refusing to pay the rentals stipulated therein for water furnished, but offering to pay a reasonable price therefor. On the 7th day of December, 1900, the city filed a bill in the Chancery Court of Warren County, Mississippi, alleging that the franchise had been forfeited by reason of various things done and left undone, and praying that a decree be rendered absolving it from any further liability or obligation thereunder.

On February 13, 1901, the Vicksburg Water Works Company filed its bill of complaint in the Circuit Court of the United States for the Southern District of Mississippi, setting up all of the above facts, and alleging that it was the purpose

of the City of Vicksburg to construct a waterworks plant of its own to be immediately operated in competition with its system, that it was unable to compete with a municipal owned plant, and would be financially destroyed if it were forced to do so. The jurisdiction of the Federal Court was invoked on the ground that the act of the Legislature and the various ordinances of the City of Vicksburg adopted in pursuance thereof were laws impairing the obligation of its franchise or contract.

As the principal question presented by this appeal is whether or not the decree in the suit thus begun is conclusive of the case at bar we will, in arguing that question, set out in greater detail the allegations of this bill of complaint and of the supplemental one which was later filed. It is sufficient now to say that the city answered, admitting its purpose to build a waterworks system to be at once operated in competition with that owned by the complainant, and asserting its right to do so, and that finally a decree was rendered in accordance with the prayer of the bill, enjoining the City of Vicksburg from "constructing waterworks of its own until the expiration of the period prescribed in the said ordinance contract and franchise, dated 18th of November, 1886."

Before answering, however, the defendant filed a plea to the jurisdiction of the court, which was sustained by the Circuit Court, which certified the question of its jurisdiction to this Court, which, in the case of *Vicksburg Water Works Company vs. Mayor and Aldermen of the City of Vicksburg*, 185 U. S., 65, reversed the decree of the lower court and held that a federal question was properly presented. Mr. Justice Shiras, in delivering the opinion of the court, expressly stated that nothing was intended to be decided but the question of jurisdiction.

Upon the rendition of the final decree, enjoining the city, as above stated, an appeal was prosecuted to this court, which, in the case of *Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company*, 202 U. S., 453, affirmed the decree of the lower court.

The effect of the final decree in this case was of course to put a stop to the issuance of the proposed bonds and to the city's plan to construct and operate a waterworks system in competition with that of the Vicksburg Water Works Company. In the year 1904, however, the city under the authority of appropriate legislation, undertook to regulate both the "meter rates" and the "flat rates" under which water was then being furnished to the people of Vicksburg and adopted ordinances fixing the rates to be charged. On January 1, 1905, the Vicksburg Water Works Company filed its bill of complaint in the Circuit Court of the United States for the Southern District of Mississippi, alleging that these ordinances impaired the obligation of its franchise or contract, and praying that the city be enjoined from enforcing them. It was further alleged that the effect of the decree in the prior case, which was No. 41 on the docket of the Circuit Court, the case we are now discussing being No. 79 thereon, was to preclude the city from regulating the rates of the water company, or, in other words, that the matter was *res adjudicata*. It is unnecessary to recite here the grounds upon which the city claimed the right to regulate water rates, but it is sufficient to say that a final decree was rendered, enjoining it from so doing. An appeal was prosecuted to this court, which, in the case of Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company, 206 U. S., 496, affirmed the decree of the lower court.

There have been various other controversies between the city and the water company, which have found their way into the courts, but the cases above referred to are the only ones which have any bearing upon the questions presented on this appeal.

After the final determination of these cases there was much negotiation between the city and the water company, looking to the purchase of the waterworks system, either at a fixed price, or at an appraised valuation, but no agreement was reached, and, as the franchise expires in November, 1916, the city, on the 1st day of January, 1912, declared its purpose and

intention to construct a system of waterworks of its own, *to be operated only after the expiration of the said franchise*, and to that end it called an election to determine whether or not the voters of the city would authorize the issuance of \$400,000.00 of bonds to secure funds with which to do so. The election was held and the bonds were authorized by a vote of 1091 to 167.

On March 2, 1912, W. A. Henson, who had theretofore been appointed Receiver of the Vicksburg Water Works Company, filed a bill of complaint in the District Court for the Southern District of Mississippi, and on May 6, 1912, he filed therein an amended and supplemental bill of complaint, which together form the basis of this action. He set out the purpose of the city to issue bonds to construct a waterworks system to be operated after the expiration of the franchise held by his company, and alleged that under the provisions of the franchise, which we have already quoted, the exclusive privilege during the entire period of thirty years was conferred of "erecting, maintaining and operating" a system of waterworks, and that this right would be violated if the city should erect waterworks in anticipation of the expiration of the franchise, even though they were only to be operated thereafter. In other words, the claim was made that the city could not begin work upon the construction of a plant of its own until after the franchise had expired, because it had by the grant of the franchise, deliberately disabled itself from complying with its duty to furnish water to its inhabitants at its expiration. It was conceded that if the franchise be thus construed, the effect will be to require the city to purchase the existing plant without regard to the desirability of so doing, for the reason that the water works company will be under no duty to furnish water after its expiration, and if the city cannot complete a plant before that time and be in a position to supply water itself it will have to buy the existing plant in order that its inhabitants may have the absolutely essential supply of water.

It was further alleged that the effect of the decree in case No. 41 Equity and of the opinion of this court affirming it, as

reported in 202 U. S., 453, was to adjudicate that the city not only did not have the right to erect waterworks at the time that suit was instituted, to be operated in competition with the existing plant, but that it has not the right now or at any time before the expiration of the franchise to erect waterworks to be operated only after its expiration. The jurisdiction of the court was also invoked on the ground of diverse citizenship, and upon the ground that the ordinances and resolutions adopted by the city were laws impairing the obligation of the franchise contract in violation of Section 10 of Article 1 of the Constitution of the United States. Other allegations were made as to irregularities in the conduct of the bond election and in the steps preliminary thereto, which though not of sufficient importance to be here set out, we will briefly discuss in the argument.

The defendant answered the original and supplemental bills of complaint, denying that the franchise prohibited it from constructing a waterworks system of its own to be operated after its expiration, and that such was the effect of the decree in case No. 41 Equity and of the opinion of this court affirming it. It denied that this question was in any way involved in that litigation, but averred that the sole question presented to the lower court and to this court on appeal was whether or not the city had the right to build a waterworks system for the purpose of competing with the water company.

The answer further set up that the defendant had already within the past three or four years expended large sums of money, aggregating more than \$30,000.00, in laying water mains under streets which it intended to pave, with the intention that the mains so laid should form part of a complete system afterwards to be constructed by it; that this was done with the full knowledge of the water company, which undertook, as a taxpayer, to prevent the city from making these expenditures, solely upon the ground that it was a violation of the provisions of its charter in regard to its indebtedness, and that no protest was ever made or entered upon the ground that to lay these mains was in any way to violate its franchise or the injunction in

cause No. 41 Equity. It averred that by reason of the water company's failure to assert that the city's action in laying these mains was a violation of its rights, it was induced to expend a large sum of money and the water company was estopped now to make such claim.

Many months after the filing of the answer the city advertised for bids for paving certain of its streets and for laying water mains thereunder, whereupon the water company secured a temporary restraining order prohibiting the city from letting contracts to lay water mains, upon the grounds set up in its bills of complaint. This temporary restraining order was made permanent in the final decree.

A large amount of testimony was taken, all of which in our opinion, except that taken by the city to show the conduct and result of the election, and to establish the facts relied upon to support its claim of estoppel, is utterly irrelevant. A motion to suppress was made by the defendant, but was not acted upon by the court. What purports to be an abstract of this testimony was prepared by counsel for the appellee, and was incorporated in the transcript of record by order of the judge of the trial court over the protest and objection of counsel for appellant.

Generally stated, it relates to the long-continued negotiations between the city and the water company, looking to the settlement of their controversies, to the value of the existing plant, and in great detail to the valuation placed on it by an engineer employed by the city and by another engineer employed by the water company and by the water company itself. It also purports to narrate arguments used in the city council of Vicksburg, and to reproduce publications made in the daily newspapers during the progress of the campaign preceding the election to determine the issuance of the \$400,000.00 of bonds in question. It pretends to show the motives that influenced the voters, the arguments made to them, and that trifling sums were expended by the city in making newspaper and

other publications. While we do not all concede that this testimony is true, it is in our opinion so grossly immaterial and irrelevant that we felt it would be an imposition upon the court to disprove it by counter testimony, and it only appears in the transcript of record, as we have said, because it was ordered to be put there over our objection. Under our conception of the equity rules recently promulgated by this court, it should form no part of the transcript, and we disclaim any responsibility for it.

The opinion of the judge of the court of first instance and that of the Circuit Court of Appeals show that their action was based solely upon the plea of *res adjudicata*, and that for this reason alone the city was enjoined from constructing a waterworks system or any part thereof, before the expiration of the franchise of the water works company, and from issuing bonds for that purpose.

ARGUMENT.

We base our contention, that the decrees of the lower courts are erroneous, and should be reversed, upon five grounds.

1st. THE FRANCHISE DOES NOT PROHIBIT THE CITY FROM ERECTING WATERWORKS TO BE OPERATED AFTER ITS TERMINATION.

2nd. THE RIGHT OF THE CITY TO ERECT WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE WAS NOT INVOLVED IN CAUSE NUMBER 41 EQUITY, AND WAS NOT AND COULD NOT HAVE BEEN ADJUDICATED THEREIN.

3rd. APPELLEE IS NOW ESTOPPED TO ASSERT THAT THE CITY CANNOT ERECT WATERWORKS TO BE

OPERATED AFTER THE TERMINATION OF THE FRANCHISE.

4th. THE CITY SHOULD NOT BE ENJOINED FROM ERECTING WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE FOR THE REASON THAT SUCH A DECREE WOULD, AT THIS TIME BE INEQUITABLE.

5th. THE BONDS WERE LEGALLY AUTHORIZED.

FIRST.

THE FRANCHISE DOES NOT PROHIBIT THE CITY FROM ERECTING WATERWORKS TO BE OPERATED AFTER ITS TERMINATION.

It is so clear that the *franchise*, when properly construed, does not have the effect of preventing the city from erecting waterworks, to be operated after its expiration, that counsel for appellee, when they drafted their original bill of complaint, did not even so contend. The original bill was based solely upon the idea that the decree in cause No. 41, Equity, prohibited the city from erecting waterworks at any time, and for any purpose during the life of the franchise. After several months' reflection, however, a theory was evolved which is presented in the supplemental bill that the *franchise*, as well as the *decree*, contains such prohibition.

The portion of the franchise which is thus invoked is as follows:

"Section 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of (30) years from the time this ordinance takes effect unto Samuel

R. Bullock and Company, their associates, successors and assigns, *of erecting, maintaining and operating* a sytem of waterworks, in accordance with the terms and provisions of this ordinance and of using the streets, alleys, public squares, and other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist, or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants, for public and private use and for making repairs and extensions to the said system from time to time during the period in which this ordinance is in force."

It is elementary that all public grants are to be construed most liberally in favor of the public; that nothing passes by implication; that all privileges claimed must be expressed in clear and apt language, and that in case of a doubt as to the true meaning, such doubt must be resolved in favor of the public and against the grantee.

These principles have been enunciated so many times by this court that citation of authorities is unnecessary. In the case of Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company, 206, U. S., 496, which has been heretofore referred to as cause No. 79 Equity it was said:

"In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed its doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect."

The question then is, not what would be the meaning of Section 1 of the franchise, if it formed part of a contract between individuals but what its effect is as a public grant, and in determining this the court must consider whether or not the city of Vicksburg, by clear and apt terms, beyond any reasonable doubt, and without resort to implication, intended to and did preclude itself from constructing waterworks of its own at a time when the franchise should be nearing its expiration, in order to operate them, not in competition with the existing plant, but only after the right to operate that plant had ceased and terminated.

We submit that to state this proposition is to answer it. Indeed, it would seem that the language of the franchise, so far from making clear the city's intention thus to disable itself from performing one of its fundamental duties, shows beyond a doubt that there was no such purpose. There was granted the exclusive right and privilege to "erect, maintain and operate" a system of waterworks for the purpose of furnishing the city and its inhabitants with a good and adequate supply of water. It is manifest that the object of the grant was to secure a supply of water, and that the right to erect was granted merely as antecedent and necessary to the desired result, which could only be reached by the erection, the maintenance and the operation of a waterworks system. In other words, the right to erect, maintain and operate is a single and indivisible thing and is in fact entirely synonymous with the right to supply water.

It is argued by counsel for appellee that the city granted three separate privileges by this franchise, and that they exist independently of each other, viz:

First, the right to erect, second, the right to maintain, and, third, the right to operate.

If this be so, three different franchises were granted instead of one, and the grantees, having a franchise merely to erect waterworks, could have complied with their obligation by erecting without maintaining or operating, and thus, although

the declared purpose of the grant was to secure an adequate supply of water, one of the three separate privileges which counsel for appellee say were conferred, could have been availed of with the effect that the entire purpose of the grant would be defeated.

If Bullock & Company acquired an exclusive right to erect only, no one else could either erect or maintain and operate, because, of course, a waterworks system cannot be maintained and operated without first being erected. We submit that these considerations demonstrate the utter fallacy of counsel's argument. As we have said, the franchise was in effect a grant of the right to supply water, and the phrase, "erect, maintain and operate," was merely adopted as a means of expressing the intention of the parties with the usual legal tautology and in the customary legal cant. It cannot be doubted, we think, that if the grant had simply been of the exclusive right for a period of thirty years to erect waterworks for the purpose of supplying the people with water, the effect would have been precisely the same. Again, it is perfectly clear to us that had the city conferred the exclusive privilege of maintaining and operating waterworks for a period of thirty years for the purpose of supplying water, the same result would have been accomplished.

Under the construction contended for by counsel for appellee, the city placed itself in a most extraordinary attitude, by providing for water for a period of thirty years only and disabling itself from insuring a continuance of the supply after the expiration of that time. Several years, of course, are required to construct a system of waterworks, and unless work can begin before the expiration of the franchise, at the time of its termination the city will have no plant ready to furnish water and no obligation will rest upon the present water works company to do so. The result will be that the city will have to purchase the existing plant without regard to its adequacy or to the desirability of so doing, in order to prevent the calamity which would ensue upon the cessation of the water supply, for its owners have already threatened to discontinue furnishing water upon the expiration of the franchise. And this is pre-

cisely what counsel for appellee contend the city deliberately contrived to bring about. They say that it was purposely provided that the city could not erect waterworks during the lifetime of the franchise so that on its expiration it would have to avail itself of the option to purchase; that although no legal obligation rests upon the city to purchase it conspired against itself to make a purchase in fact unavoidable.

They evidently recognize that any franchise which would result in the city's being deprived of water at its expiration would be void for unreasonableness, and to avoid this difficulty they point out that the city has a right to purchase the existing plant at an appraised valuation at certain stipulated periods, and argue that the existence of this option absolutely controls or changes the meaning of Section 1 of the franchise. They admit that without the option to purchase the city would have the right to erect waterworks before the expiration of the franchise, to be operated only thereafter, but say that because of the option no such right exists. On the other hand, we cannot conceive that a mere option to purchase can have any possible relevancy in determining whether or not the city excluded itself from erecting its own waterworks during the life of the contract. If the purpose had been to compel the city to purchase, the franchise would, of course, have contained such an obligation expressed in clear and apt words. Such provisions were then and are now common in franchises. No reason is suggested why, if the city intended to bind itself to purchase, it should have done so in so clumsy and round-about a way.

The attempt to give to a mere option to purchase the effect of a binding obligation so to do, is very similar to the contention advanced in the very recent case of *Denver vs. New York Trust Company*, decided by this court on May 26, 1913, and not yet officially reported. It was thus stated in the opinion:

"The principal controversy is over the purpose and effect of Sections 11 and 12 of that ordinance. As be-

fore shown, Section 11 states that at the expiration of twenty years the plant 'may be purchased' by the city, if it 'shall then elect so to do,' and Section 12 says that at the expiration of that period, the city 'may, at its election, renew the contract hereby made,' with a reduction of 10 per cent. in the rental for hydrants. The word 'contract' is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets. Each section reserves or gives to the city a pure option. Under one it may purchase the plant, if it so elects, and under the other it may, at its election, renew the contract; but neither imposes any duty or obligation upon it, unless it exercises the privilege therein given. Such is the natural import of the terms employed, and they are plain and unequivocal. But it is said that the presence of the two options imposes on the city the duty of accepting one. Indeed, it is said in support of the bill that a failure to renew is an election to purchase, and in support of the cross bill that a failure to purchase is an election to renew. We are clearly of the opinion that these claims are ill-founded. In the absence of some stipulations to that end the city would be under no obligation to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. Its situation is not unlike that of one who has sold real property, with a reserved privilege of repurchasing it or of taking a lease upon it after the expiration of a term of years. Although entitled to avail himself of either phase of the privilege, he is free to reject both."

It will be seen that this court utterly repudiated the suggestion that an option can be twisted or distorted into a binding obligation. While the facts are not precisely the same, the contention made in the *Denver* case and that here made are founded upon the same erroneous conception that in construing

public grants vital obligations and restrictions can be founded upon mere implication and argument.

A similar ruling was made by the Court of Appeals of New York in the case of *Syracuse Water Works Co., vs. City of Syracuse*, 116 N. Y. 167, as follows:

"It is however, urged that the city can avail itself of no means, other than that through the plaintiff, to obtain any water supply, except by resuming and taking its property and powers in the manner prescribed in one of the Section 26 and 29 of the plaintiff's charter, to which reference has already been made. It appears that those provisions were inserted in the charter at the suggestion or request of the common council of the city; and that was evidently done to enable it, in the event referred to in the one, and on the expiration of the time mentioned in the other, section, if the interest of the city should require it, to take the matter of its water supply into its own management and control. It is not seen that this right, reserved to the city, has any essential bearing upon the question of the construction of the grant to the plaintiff. It simply gave the city the opportunity, in the events provided, to become possessed of the property which should constitute the plant of the plaintiff, and be applied to the service of furnishing water to the city. This right was not made a legal duty, upon the performance of which was dependent the power to use means other than through the plaintiff to obtain further means of water supply for the city. It was a privilege, merely, which it might or might not exercise at pleasure."

To the same effect see *Thomas vs. City of Grand Junction*, 56 Pac., 665; *Long vs. City of Duluth*, 51 N. W., 913; *Skaneateles Water Works Co. vs. Village of Skaneateles*, 184 U. S., 354.

If, by reason of the option to purchase the franchise shall be construed as prohibiting the city from erecting waterworks at this time without operating them, then it will, we repeat, have

been given the practical effect of an obligation to buy, for the city cannot exist without water pending the period during which a new plant is being built, if work can only be commenced after the termination of the franchise. It needs no argument to establish the fact that water is so vital a necessity to a city that the discontinuance of its supply for even a few days would bring irretrievable disaster. It is, therefore, indispensable that provision be made for continuing the supply of water upon the termination of the franchise, and it is this which the city proposes to do by building a waterworks plant and holding it in readiness to commence the performance of its functions at that time. On the other hand, the franchise held by the water company is expressly limited to thirty years, and the city acquiesces in the claim that for the full period thereof its holder is entitled to all of the privileges and immunities conferred by it. While, as we have shown, untold damage will result to the city if it is prohibited from building a waterworks system at this time, on the contrary no damage in a legal sense will result to the water company by the establishment of such an enterprise. The city has never obligated itself that it would purchase the waterworks plant. It is not contended that any right would be violated if the city at the expiration of the franchise flatly refused to buy. It is not and cannot be claimed that the water company can continue business at that time. The argument is that the city was prohibited from building so that the water company, at the expiration of the franchise would be in a position to say to it:

"You and your citizens are absolutely dependent upon a supply of water. We are in a position to furnish it and no one else is. We will not do so, and as you cannot do so, water cannot be had unless you will purchase our plant."

We submit that while the construction by the city at this time of a waterworks system would prevent the water company

from thus adopting the methods of the highwayman and demanding the city's money or its life, it would not damage it in a legal sense.

It was seriously contended in the courts below that the city bound itself not to erect waterworks, though with no intention of using them before the expiration of the franchise in exchange for the option given it to purchase the plant to be erected, and yet, if there were no such option the city could take by condemnation. The scheme for purchase at an appraised valuation was inserted quite as much for the benefit of the grantee as for that of the grantor. It is very much more desirable, indeed, to it to be able to sell than to the city to be able to purchase, and it certainly gave up nothing by facilitating the sale of its property.

We almost feel that we should apologize to the court for devoting so much space to a discussion of the city's right to build now by way of preparation for the performance of its duty of keeping its inhabitants supplied with water after the expiration of the outstanding franchise for the reason that this precise question has already been determined by this court under a state of facts almost identical with those of the case at bar. We refer to the case of *El Paso Water Company vs. the City of El Paso*, 152 U.S., 157. The City of El Paso, by an ordinance passed May 7, 1881, undertook to grant "the sole and exclusive right, warrant and authority for a period of fifteen years to manufacture, sell and furnish to the inhabitants of the City of El Paso, to both public and private buildings and for irrigation, within the corporate limits of said city," with "the sole and exclusive right, warrant and authority for said period, to lay pipes, mains and conductors underneath the streets, alleys, lanes and squares in said city, for the purpose of conducting water," and by a subsequent ordinance, rented hydrants at a certain annual rent.

In the years 1889 and 1890 two ordinances were passed and approved by a vote of the people, authorizing the issue of

\$25,000.00 and \$75,000.00, respectively, of the bonds of the city, for the avowed and declared purpose of sinking artesian wells and constructing a system of waterworks to be owned and operated by the city for supplying water to it and its inhabitants for all public and private purposes. The water works company filed a bill seeking to enjoin the city from establishing, maintaining or operating any waterworks within its limits until the expiration of the franchise period of fifteen years, and from selling or negotiating any bonds or other securities for that purpose.

The opinion of the court was delivered by Mr. Justice Brewer, and as we regard it as of controlling importance, and as it is very short, we quote it herewith in full:

"Probably the circuit court sustained the demurrer on the ground that under the constitution of the State of Texas, adopted in 1876, the attempt to grant exclusive rights in these matters was beyond the power of the city, and that, among other matters, is discussed at length by counsel in their respective briefs. That constitution (Art. 1, Paragraph 26) provides that 'perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.' In the case of *Brenham vs. Brenham Water Co.*, 67 Tex. 542, the Supreme Court of the State construing this provision, held that a contract similar to that made with the plaintiff was inhibited by the constitution, and that neither the City Council nor the State Legislature had power to make or authorize such a contract.

"We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over \$5,000 in controversy, as is necessary to give this court jurisdiction. The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city and sought to be enjoined, would result in its damage to an amount

in excess of \$5,000. So far as respects the matter of taxes, which by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.

"With regard to the claim of exclusive rights there is no allegation in the bills of the time at which the city will, unless restrained, commence the operation of its contemplated system of waterworks, and thus interfere with the actual performance of its contract with the plaintiff so far as respects the supply of water. Every averment would be satisfied by proof that the city intended to begin the use of its proposed waterworks on the day before the expiration of the fifteen years. And the only distinct disclosure of damage in the bills, or by the affidavits filed in this court is that resulting from an actual supply of water by the city and a failure to pay the plaintiff for the use of its hydrants. So far as the mere construction of waterworks is concerned, that of itself is no violation of the terms of this contract. The time for which the exclusive right, as claimed was given, was fifteen years, and the city would be guilty of no breach of any obligations if, during the life of the contract, it proceeded to sink artesian wells, to establish waterworks and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks and had continued its labors in that direction during the entire life of the contract, that would have been no breach of its obligation to the plaintiff. It might have affected pecuniarily the value of the plaintiff's plant in that it carried a strong intimation that the moment the fifteen years expired the city would itself engage in the work of supplying water, and thus take from the plaintiff its business. So, preparations made by the city at the time stated in the bills, to-wit: 1889 and 1890 for the establishment of

waterworks may and doubtless did, have some effect upon the value of the plaintiff's property, but the extent of the diminution of value thus caused is not alleged, and cannot be inferred. The bills do not allege that the city in terms denies the validity of its agreements to pay rent for hydrants or otherwise, and the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract, and as a mere matter of preparation for the discharge of a public duty after the termination of that contract. Under the circumstances, we are of the opinion that it is not affirmatively disclosed by the record that the amount in controversy is a sum in excess of \$5,000 and therefore, for want of jurisdiction in this court, the appeal must be dismissed."

It is urgently contended on behalf of appellee that the decision that the building of a waterworks system before the expiration of the franchise, to be operated thereafter, was not a violation of the contract was obiter dictum for the reason that the only question presented was one of jurisdiction. One of the counsel for appellee in his brief in the court below even went so far as to characterize it as "the mere talk" of the judge who was the mouthpiece of the court, although it constitutes almost the entire opinion.

It is, of course, true that the case went off upon a question of jurisdiction of the appeal, but in order to determine this it was necessary for the court to decide just what it did. At that time, to maintain an appeal from a lower federal court, it was ordinarily necessary that over \$5,000.00 be involved and that this fact affirmatively appear from the record. The court, therefore, examined into the case as made by the record and determined the law insofar as was necessary to decide whether the jurisdictional amount was in fact involved. It held that it was without jurisdiction as no contract right was shown by the allegations of the bill to have been violated, and as no money damage appeared to have been done, and pointed out

that it was not even alleged that more than \$5,000.00 was involved.

It will, therefore, be seen that the question presented in this case was precisely that involved in the matter now under discussion. Counsel for appellee in the courts below made desperate efforts to escape the force of this case and to distinguish it from the case at bar by quibbling over the exact phraseology of the two franchises. It was argued, for instance, that because the word "erect" was not used in the El Paso franchise, the case is not in point. The statement of facts discloses that the "sole and exclusive right, warrant and authority for the period of fifteen years to manufacture, sell and furnish water to the inhabitants of the City of El Paso to both public and private buildings, and for irrigation within the corporate limits of said city" was granted "with the sole and exclusive right, warrant and authority for said period to lay pipes, mains, and conductors underneath the streets, alleys, lanes and squares of said city for the purpose of conducting water." There was thus in terms an absolute grant, both of the exclusive right to furnish water and to lay mains. The laying of mains is in itself a necessary and most important part of the construction or "erection" of a waterworks system. Water cannot be furnished without mains, and if an exclusive right to "erect" mains is given the practical effect is the same as if the exclusive right were given to "erect" the entire system.

Aside from this, in the case at bar the city has been specifically enjoined from laying mains under its streets upon the theory that the effect of the franchise was to prohibit it from laying mains until its expiration. In this particular the two franchises are not only substantially but actually the same. The question presented in both cases is whether a city having granted an exclusive franchise has the right before its expiration to erect a system of waterworks or any part thereof, whether it be the laying of mains or setting up of machinery, and in the El Paso case the court, in holding that

such power exists, provided there be no attempt to operate the system until the termination of the franchise, placed the decision on the ground that "the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract and as a mere matter of preparation for the discharge of a public duty after the termination of that contract."

As we have said before, we regard this case as absolutely settling the meaning of the Vicksburg franchise. Of course, counsel contend that because the El Paso franchise did not contain an option on behalf of the city to purchase the waterworks plant at its expiration, the situation was different. We simply cannot conceive that this court could have been influenced in its decision by the existence or non-existence of such an option. The question presented was whether or not the city was precluded from erecting waterworks, and this is entirely apart from any right which it might have to purchase. The two things are wholly independent one of the other, and the determination of the effect of the city's grant cannot be made to depend upon its right to purchase.

If, in fact, the right of the City of El Paso to build waterworks depended, as counsel say, on the lack of a power to purchase, it is singular indeed that no allusion was made to it in the opinion. The argument of counsel proceeds upon the assumption that the city was permitted to build only to prevent a failure of its water supply inasmuch as it did not have a contract right to buy. The decision, however, was founded wholly upon the holding that the city by building and not operating would violate no right of the water company and no obligation of its franchise.

It was expressly said: "Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks, and had continued its labors in that direction during the entire life of the contract, that

would have been no breach of its obligation to plaintiff." And again the court said: "So far as the mere construction of water-works is concerned, that, of itself, is no violation of the terms of this contract."

This language is wholly inconsistent with the idea that if there had been an option to purchase there would have been an obligation not to build. The question of what was granted could never have been determined by the utterly irrelevant consideration of whether there existed a mere option to buy.

Again counsel find comfort in the provision of the Texas Constitution prohibiting monopolies and perpetuities, which they say rendered void the exclusive feature of the El Paso franchise, and they argue that for this reason the El Paso case is not in point. And yet this court, at the beginning of its opinion, was careful to say in reference to the argument based on this clause: "We do not deem it necessary to consider the important constitutional question thus presented."

The anomalous condition is thus presented of counsel's insisting that the court was absolutely controlled by a matter the mere consideration of which it expressly disclaimed.

While we consider the El Paso case as absolutely conclusive, we also call attention to that of *Sioux Falls vs. Farmers' Loan & Trust Co.*, 136 Fed. 721. The City of Sioux Falls, South Dakota, had, like the City of Vicksburg, granted an exclusive franchise for the erection and operation of a waterworks system, and, like the City of Vicksburg, some four years before its expiration, undertook to build one of its own. A bill was filed to enjoin it from issuing the necessary bonds on various grounds, and the court in a very few words, disposed of the contention that in undertaking to build before the expiration of the franchise, it violated its letter or spirit by saying:

"Recognizing this rule the city treated the contract as a binding contract upon it for twenty years. In its answers, both to the bill and cross bill, it is alleged that the city had no intention of operating the system of

waterworks which it proposed to build until after the expiration of the contract between the city and Kuhn; and for the full term of twenty years both the city and the water company have performed their several obligations under the contract."

Counsel for appellee seek to distinguish this case on the ground that the franchise had expired shortly before the Circuit Court of Appeals delivered its opinion. No allusion whatever was made to this fact in the opinion and it is doubtful if the court even observed it. Counsel acquired their information only by comparing the date of the expiration of the franchise with that of the delivery of the opinion. Of course, the validity of the bonds was to be determined by the city's right to issue them when it sought to do so and it was enjoined several years before the franchise expired. The mere fact that this event occurred before the case was finally disposed of in the appellate court was not of the slightest importance and was not even alluded to by the court.

We submit that the rights and obligations of El Paso, Sioux Falls and Vicksburg, so far as concerned the building of waterworks, were identical and that what was deemed so free from doubt in the prior cases is equally clear in the one at bar.

We are unable to believe that the City of Vicksburg will be prohibited from "a mere preparation for the discharge of a public duty after the termination" of its contract, notwithstanding the fantastic theory which counsel have evolved in the effort to import such a prohibition into the franchise.

SECOND.

THE RIGHT OF THE CITY TO ERECT WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE WAS NOT INVOLVED IN CAUSE NO. 41 EQUITY, AND WAS NOT AND COULD NOT HAVE BEEN ADJUDICATED THEREIN.

The opinion of the District Court, which will be found on page 206 of the transcript, shows that the injunction was granted upon the sole ground that the city is estopped by the decree in Cause No. 41 Equity to assert now its right to build waterworks, even though they are not intended to be operated until after the expiration of the franchise. The court said:

"Believing as we do that the real question here presented has been decided in express terms by this court and affirmed by the Supreme Court of the United States in 202 U. S. 458-472, and is *res adjudicata*, it is not necessary to consider any other question presented by learned counsel."

The Circuit Court of Appeals affirmed the decree of the District Court on the same ground. Its opinion appears on page 227 of the transcript, and is in full as follows:

"The motion to dismiss this appeal is overruled. On the merits, a majority of the judges being of opinion that the decree of the Circuit Court in Cause No. 41 on the docket, affirmed by the Supreme Court in *Vicksburg vs. Vicksburg Water Works*, 202 U. S., 453, constitutes an estoppel against the City of Vicksburg in the present suit, the decree appealed from should be and it is affirmed."

It is thus manifest that although two courts have held that the City of Vicksburg has no right to build waterworks at this time when the franchise is nearing its end, in anticipation of that event and by way of preparation to perform the duty which will then devolve upon it of furnishing water to its citizens, it has not been held that this disability arises from anything contained in the franchise which is the contract entered

into by the parties to this cause. It is held that such disability exists only because in a prior litigation a decree was rendered enjoining the city from building waterworks. We have, we think, already demonstrated that the franchise, when properly construed according to its plain terms, and particularly in view of the *El Paso* case, *supra*, could not be given this effect, and as the decree in the former cause was founded upon the franchise, undertook to interpret and apply it, and was not and could not have been rendered with the purpose and intent of changing the obligations and restrictions of the parties thereto, a singular condition will have arisen if the contract permits the city to do what it now proposes to do and yet the decree of a court of equity founded thereon forbids it to do so. We submit, therefore, at the outset of our discussion of this branch of the case, that so extraordinary a result should not be countenanced if it can be legitimately avoided. Appellees' victory in the two lower courts has not been founded upon the protection of any contract right, and if this court, in construing the franchise, shall hold that the decree confers rights and imposes limitations broader than the contract on which it was founded, a miscarriage of justice will certainly have occurred. The rules of judicial procedure, and the doctrine of *res adjudicata* were not intended to lead to such results. On the contrary the greatest caution and strictness are observed in dealing with the matter of estoppel by judgment or decree to avoid the doing of injustice.

Thus it has been expressly decided that the burden of proof is on the party asserting an estoppel by judgment.

Harrison vs. Remington Paper Co., 140 Fed., 385.

Lewis vs. Ocean Navigation & Pier Co., 125 N. Y., 341.

Again, it has many times been held that upon an issue of *res adjudicata* all doubts must be resolved against the party pleading it.

"Now, it is of the essence of estoppel by judgment that it is certain that the principal fact was determined by the former judgment."

DeSollar vs. Hanscome, 158 U. S., 216.

"According to Coke, an estoppel must be 'certain to every intent' and if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered in evidence."

Russell vs. Place, 94 U. S. 606.

"Matters essential to complainant's right to relief must appear not by inference, but by direct and unambiguous averment."

Duckworth vs. Duckworth, 35 Ala., 70.

"No judgment or decree is evidence in relation to any matter which came collaterally in question, nor to any matter incidentally cognizable, or to be inferred from the judgment only by argument or construction. An estoppel cannot be created by mere argument."

Freeman on Judgments, Sec. 258.

"The rule as to the conclusiveness of a judgment or decree of a court of competent jurisdiction, does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree."

Hopkins vs. Lee, 6 Wheat, 109.

It is by reason of the jealous strictness with which the rights of litigants are guarded against any possibility of injury or wrong by misapplication of the doctrine of res adjudicata, that it has been said to have ceased to be odious, and

that on the contrary, "it is more than freed from approbrious appellations. The vocabulary of the judges has been well-nigh exhausted to supply it with honorable and endearing titles."

Freeman on Judgments, 247.

Certainly, a doctrine so highly praised was never intended to broaden and enlarge contract rights, to restrict a governmental agency in the performance of its duty, to bar defenses never asserted under circumstances which would have made their interposition impossible, or to establish conclusively matters which the very litigants themselves never knew were in issue. And yet we submit that this is precisely the effect of the decree appealed from.

This court has held, and it is elementary law, that "the essential conditions upon which the exception of *res adjudicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

Washington A. & G. Packet Co. vs. Sickles, 24 How., 333.
See also Freeman on Judgments, 252.

It is conceded that the requisite identity as to parties exists, and it is only necessary, therefore, to inquire whether or not the real matter in litigation in Cause No. 41 Equity was the same as that here involved. To solve this question it is first necessary to inquire whether or not the cause of action in both cases was the same, for if this be so all matters are concluded which were or might have been litigated, while otherwise only those defenses are barred which were actually asserted in the prior cause. This doctrine was enunciated with great force and elaboration in *Cromwell vs. County of Sac*, 94 U. S., 351 which is the leading case on the law of estoppel by judgment. Indeed, it has been cited with approval and followed by the appellate tribunals of most, if not all of these states. It was an action on four bonds of the County of Sac in the State of Iowa, each for

\$1,000.00 and four coupons for interest attached to them, each for \$100.00. To defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior cause brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff, Cromwell, was at the time the owner of the coupons in that action, and that was prosecuted for his sole use and benefit. This court held that the two causes of action were different, and that there was, therefore, no estoppel, saying:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but

also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated, and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Cause No. 41 Equity, the decree in which is relied upon as conclusive of the case at bar, was instituted February 13, 1901 for the purpose of enjoining the City of Vicksburg from building waterworks under an act of the Legislature of Mississippi enacted in the year 1900, which authorized the issuance of \$150,000.00 of bonds to secure funds for that purpose. At that time the franchise had more than fifteen years to run, and as we will show later by a detailed reference to the pleadings, the purpose entertained by the city was to build waterworks to be immediately operated in competition with those of the complainant and the validity of the franchise was denied by the city and its right to compete asserted. At that time there was pending in the Chancery Court of Warren County, Mississippi, a bill filed by the city asking that the franchise be declared forfeited for various reasons not necessary to relate here, and in its answer in Cause No. 41 Equity the city denied that by the terms of the franchise it had ever excluded itself from competing with the existing company or from granting a franchise to other persons.

In the case at bar the suit was instituted March 2, 1912, something over four years before the expiration of the franchise, to enjoin the city from effectuating its declared purpose to build waterworks to be operated, not in competition with the complainant, but after the expiration of its rights under the franchise. The city was proceeding under the authority of an amendment to its charter adopted in the year 1905, and had held an election at which the issuance of \$400,000.00 of bonds was authorized. It thus appears that the two controversies involved the exercise of corporate powers conferred by entirely distinct legislation; that in the first controversy the city denied the validity of the franchise and asserted its right to compete with the existing company, and that in the second suit the city admits the validity of the franchise and denies its purpose to compete. There can be no doubt, therefore, we submit, that the causes of action were different and it follows that the city is not precluded from interposing any defense to the action to enjoin it from building waterworks as now contemplated which was not actually made and adjudicated in the prior cause. The inquiry, therefore, is as to what was actually litigated and decided.

This court has in a number of decisions reaffirmed the doctrine of *Cromwell vs. County of Sac*, *supra.*, and decided what constitutes different causes of action within its meaning.

The case of *Davis vs. Brown*, 94 U. S., 423, was an action against the defendants as second endorsers upon ten promissory notes of one McOmber, made at Saratoga Springs in the State of New York, in June, 1870, each for \$500.00 and payable to his order in from thirty-two to forty-one months after date. The defense set up to defeat the action was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were endorsed by the defendants as a mere matter of form, upon an

agreement in writing of the bank that they should not be held liable on their endorsements, or be sued thereon.

It was urged that this defense was barred for the reason that in a former case judgment was rendered against the defendants as second endorsers upon two notes which were part of the series of notes of McOmber's transferred to the bank by defendants in settlement of their own note and their endorsement was embraced in this agreement. In that case the defendants relied solely upon other grounds and did not plead the agreement of the bank not to hold them liable as endorsers.

The court held that notwithstanding the prior judgment they were at liberty to assert this defense, for the reason that the causes of action were different and the question thus presented was not actually litigated in that proceeding.

To the same effect see *Nesbit vs. Independent District of Riverside*, 144 U. S., 610, and *Wilmington & Weldon R. Co. vs. Alsbrook*, 146 U. S., 279. Also see *Crowder vs. Red Mountain Mining Co.* 127 Ala., 260, in which it was held that a judgment for the defendant in an action to recover an annual installment on a promissory note did not bar a subsequent action to recover the principal of the note. In all of these cases the causes of action in the respective suits were much more closely related than in the case at bar and yet it was held that they were different.

It is always admissible to consult the record of the prior case to determine what was decided, and the language of the judgment or decree relied upon as an estoppel must be interpreted with relation to and limited by the issues presented.

"When a judgment is offered in evidence in a subsequent action between the same parties on a different demand it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter when not disclosed by the pleadings must be proved by extrinsic evidence."

Davis vs. Brown, 94 U. S., 423.

"The elementary rule is that for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316.

"It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic, but we cannot say that they were intended by the district court to have any greater effect than to avoid and set aside as against Cleveland the agreement and the judgment impeached by his bill. We think on the contrary that a decree having such an effect could not have been properly rendered upon the pleadings and issue in that case."

Graham vs. R. R. Co., 3 Wall., 704.

"Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required it will be limited by construction so that its effect would be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided."

Barnes vs. Chicago, etc., R. R., 122 U. S., 1.

"The rule that no judgment is conclusive of anything not required to support it is not a mere rule of construction * * * * but is an unyielding restriction of the powers of the parties, of the court and of the jury."

Freeman on Judgments, Sec. 271.

As the contention that the city is estopped is based almost entirely upon the exact language of the decree in Cause No.

41 Equity, the elementary principle announced in the above cases is of controlling importance. The portion of the decree relied upon is as follows:

"Fifth. That the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in the said ordinance contract and franchise dated 18th of November, 1886."

It is insisted that the meaning of this language is so clear that there is no room for construction; that it must be given its full and literal signification; that because the decree enjoined the city from "constructing waterworks of its own until the expiration of the period prescribed," the city is wholly without power to build waterworks for any purpose whatsoever; that it cannot even lay disconnected mains in its streets in order that they may be paved without the necessity of tearing up and injuring the pavements to lay mains when the new plant is constructed.

The authorities cited show, we think, that this directly conflicts with elementary principles of law. Aside from this, this court in its opinion in Cause No. 79 Equity, which is reported in 206 U. S., 496, expressly held that the decree in Cause No. 41 Equity, now under discussion, "must be read in the light of the issues involved in the pleadings and relief sought."

As has been well-said, the rule that a decree cannot go beyond the issues involved is not merely one of construction, but is a limitation upon the power of the court. A most instructive case upon this point is that of *Reynolds vs. Stockton*, 140 U. S., 254. This court among other cases, cited *Munday vs. Vail*, 34 N. J. L., 418, and made the following quotation from the opinion therein, which it in express terms adopted as a correct statement of the law:

"That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

"And again, 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records of judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants.' Thus Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352b. And in a note to the *Duchess of Kingston's* case, in 2 *Smith's Lead. Cas.* 535, Baron Comyn is vouched for the proposition that judgment's 'are conclusive as to nothing which might not have been in question or were not material.'

"For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon the 'property according to the rights that appear' upon the record. I refer to the authority of Lord Redesdale. *Gifford vs. Hort*, 1 Sch. & Lef. 408. See also *Gore vs. Stacpoole*, 1

Dow, P. C. 30; Colclough vs. Sterum, 3 Bligh, 186.' Reference is made in the opinion to the case of Corwith vs. Griffing, 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject matter set forth and described in the petition. In this case the court had jurisdiction in cases of partition and the decision was upon the ground that the decree was void as it was aside from the issue which the proceeding presented.'

This ruling is, we submit, founded not alone upon common sense but upon fundamental principles of justice. It is intolerable that one's rights may be determined without notice that they are assailed. Courts of justice are confronted with the most difficult of tasks in performing the duty devolved upon them of deciding controversies which have actually arisen and are pending between suitors who appear before them, and should they undertake to adjudicate matters not necessarily in issue they would indeed add to their burden as well as inflict great wrong upon the litigants. In our reading of the cases bearing upon the law of estoppel by judgment or *res adjudicata*, we have been struck with the fact that the least important of all of the tests prescribed is the actual language of the judgment or decree. The inquiry is always as to the matters in litigation, and we have found no case where the exact phraseology of the decree is held to be the true guide.

We have already pointed out the difference in the situation and purpose of the city and of the water company at the time of the institution of Cause No. 41 Equity and that of the case at bar, and that the controversies involved were wholly dissimilar. We will now discuss in detail the allegations of the pleadings to bear out our contention that the city's right to

build waterworks to be operated after the termination of the franchise was not in issue.

The original bill of complaint, which will be found on page 106 of the transcript, contained the following allegation of fact as to the city's intention to build waterworks at that time; the act referred to being that which authorized the issuance of bonds.

"Said act is contained in Acts of 1900, page 80 reference to which is hereby made, whereby said Legislature assumed to annul and abrogate the aforesaid ordinance and contract said city entered into with said Bullock and Company and their assigns, in this, that by reason of said ordinance and contract said city has no right within the period of 30 years *to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock and Company or their assigns, notwithstanding which said act authorizes and permits said city to construct, and maintain waterworks for said purpose, if unable to buy the waterworks at the arbitrary and inadequate price fixed by said legislative act,*" etc.

That part of the prayer of the original bill which relates to the claim that by building and operating waterworks of its own the city would violate the franchise, is as follows:

"Wherefore, for as much as your orator can have no adequate relief at law but only in a court of equity, where matters of this sort are cognizable and relievable, and to the end that defendant may be required to answer (answer under oath being hereby expressly waived) each and all of the allegations hereinbefore stated, and may be required to desist the further infringement and invasion of your orator's lawful rights and may be decreed from *constructing or acquiring and operating a system of waterworks in competition with your orator's waterworks*, and to that end that

your orator may have such other and further relief as unto your honors may seem proper wherefore your orator prays."

A supplemental bill was also filed which appears on page 24 of the transcript. It's only allegations which bear on the city's right to build waterworks are as follows:

"First. Your orator would respectfully state that since the passage and approval of the act of the legislature entitled, 'An act authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000.00) dollars, to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall construct the necessary building for the hospital medical college, and for other purposes.' Said act is to be found on page 180 et seq., of the sheet acts of the said State and in accordance with its terms and provisions a pretended election was held on the 3rd day of July, 1900, under the authority of—a pretended resolution passed by the defendant on the question of bonding the city for said amounts and purposes was pretended to be submitted to the registered and qualified of—said city under its act, which propositions were carried by a small majority of the voters, which question was in words and figures as follows to-wit: 'Be it resolved by virtue of the authority vested in the Mayor and Aldermen of the City of Vicksburg, by the act of the Legislature of Mississippi, entitled an act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000.00) dollars to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system to purchase grounds for, erect and equip a city hall, construct the necessary building for the hospital medical college and for other purposes. Approved March 9th, 1900.

"An election shall be held on the third day of July on which day the question shall be submitted to the registered and qualified voters of said city whether the bonds of said city to the amounts of three hundred and fifty thousand (\$350,000.00) dollars, to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system to purchase grounds for, erect and equip a city hall; shall be sold and issued for the above named purposes."

"Third. Your orator would further show as before stated in the original bill of complaint in this cause, the defendant caused its charter to be amended by the legislature of the State of Mississippi in 1886 to provide for the erection and maintenance of a waterworks system to supply the city with water or to contract with party or parties who should build and operate waterworks and the city having elected to enter into a contract with S. R. Bullock and Company and assigns on the day of November, 1886, to provide the defendant, the city and inhabitants thereof with water for public and domestic purposes for thirty (30) years, at a stipulated price as agreed upon in said ordinance. Therefore said city by its contract and ordinance with S. R. Bullock & Company and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own, as provided by said legislative act and said resolution and said election of 1900; *in competition with your orator against its own contract.*"

The prayer of the supplemental bill, among other things, contained the following, which is all that is relevant to the matter under discussion:

"The premises considered, your orator prays that this honorable court will enjoin the defendant from issuing and selling said bonds for the purpose of build-

ing and constructing waterworks of its own *in competition with your orator* and in addition thereto that this honorable court will decree said act, resolution and election to be invalid and unconstitutional and that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city, until the expiration of your orator's contract. And that the defendant be required to answer this amended bill without making any oath thereto and that your orator be entitled to and have the benefit of all general and special relief as may be just and right."

There is nothing whatever in the city's answer which can be or is claimed to have broadened in any way the issue presented by the above allegations as to the building of waterworks. The quotations we have made show that the pleader, so far from averring the intention to build waterworks to be operated after the expiration of the franchise and not in competition with its holder, both in the original and supplemental bills, was careful to charge in precise terms that the purpose was to compete. Thus, the original bill charged that the city had no right within the period of thirty years to engage in the business of supplying water to its inhabitants and that in violation of the franchise, its intention was to construct and maintain waterworks for that purpose. The allegation of the supplemental bill as to the building of waterworks closes with a succinct statement of the rights claimed to be invaded and of the act proposed to be done, as follows:

"Therefore, said city by its contract and ordinance with Samuel R. Bullock & Co. and assigns, are precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own as provided by said legislative act and said resolution and said election of 1900 *in competition with your orator against its own contract*."

In neither the original nor supplemental bill is there the remotest suggestion that the city has no right to build waterworks during the life of the contract under any and all circumstances. There is not an allegation that by doing so it would infringe upon the rights of the complainant or injure it in any way whatsoever. The only grievance stated is that the city proposed to compete with and thus destroy the business of complainant. Indeed, the allegations of intended competition utterly exclude the possibility that the pleader had in mind a purpose on the part of the city to build waterworks and not compete with the existing plant for two such inconsistent plans could not be entertained at the same time.

We have cited numerous cases holding that a judgment or decree can be no broader than the issues upon which it is predicated. There are quite as many which hold that issues can only be raised by appropriate allegations of fact and that if a court goes beyond the issues so raised, its judgment is void.

Notwithstanding the elementary nature of this principle, we quote from a number of authorities which present it in its various aspects and phases.

"Every bill must contain in itself sufficient matters of fact per se, to maintain the case of the plaintiff; so that the same may be put in issue by the answer and established by proofs. The proof must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision; for the pleadings do not put them in contestation." *Harrison vs. Nixon*, 9 Pet., 483. (Opinion by Mr. Justice Story.)

"If indeed, it were true in fact that the bill does not allege this incompetency, so as to put it in issue, the objection would be conclusive, for it is well settled

that the decree must conform to the allegations of the parties."

Harding vs. Handy, 11 Wheat., 103. (Opinion by Chief Justice Marshall.)

"In equity a party can no more succeed upon a case proved but not alleged, than upon a case alleged but not proved."

Foster vs. Goddard, 1 Black, 506.

"No rule is better settled than that the decree must conform to the allegations as well as to the proofs in the cause."

Chief Justice Marshall in Crocket vs. Lee, 7 Wheat., 522.

"In the case of Smith vs. Ontario, 18 Black, 454, Circuit Judge Wallace observed that 'the matter in issue' has been defined in a case of leading authority as 'that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading.'"

Reynolds vs. Stockton, 140 U. S., 254.

In Outram vs. Moulwood, 3 East., 346, Lord Ellenborough said:

"It is not the recovery but the matter alleged by the party and upon which the recovery proceeds which creates the estoppel."

"A recovery must be had, if at all, upon the facts alleged."

11 Ency. Plead & Prac., 868.

Notwithstanding the necessity of appropriate allegations of fact to support a decree, counsel have never heretofore contended that either the original or supplemental bill contains any

avement of the city's purpose to erect a waterworks system of its own to be operated only after the expiration of the franchise and never in competition with the plant of appellee.

It has been urged, however, with much emphasis, that appellant's right to build waterworks for any purpose whatsoever, including that of operating them only after the expiration of the franchise, was put in issue by the prayer for relief in the supplemental bill. Indeed, it may fairly be said that the claim that it was in issue is founded solely on this prayer.

They say in effect that whether or not it was alleged that the city intended to build waterworks to be operated after the expiration of the franchise, the prayer for relief "that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract," put in issue the city's right to construct waterworks at any time, under any circumstances and for any purpose, including that now entertained by it.

We think that a careful reading of the prayer shows that it was not intended to ask for any relief other than an injunction against the building and maintaining of a competing waterworks system.

The first paragraph of the prayer is that the defendant be enjoined from "issuing and selling said bonds for the purpose of building and constructing waterworks of its own in competition with your orator," while the second is that "the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract."

It is clear, we submit, that the pleader, having first asked an injunction against the issuance of bonds to construct waterworks to be operated in competition with the existing plant, conceived the thought that the city might be able to erect such a plant without issuing bonds, and in order to cover the entire situation and prevent it from so doing either with or without the issuance of bonds, the second part of the prayer was added. We cannot believe that there was any purpose to make the in-

junction against building waterworks without issuing bonds broader than that against erecting them with the proceeds of a bond issue, and yet the prayer for the injunction, insofar as it relates to the erection of waterworks by the issuance of bonds is expressly limited to those to be operated in competition with the existing plant, while where it relates to the erection of waterworks without the issuance of bonds if literally construed it asks an injunction against constructing them at all. We repeat that it is manifest to us that the pleader, being thoroughly impregnated with the situation as it existed and with the threatened competition of the city which he sought to avoid, used the word construct as synonymous with the phrase "construct and operate." This interpretation is the only one which harmonizes the prayer for relief with the allegations of fact upon which it is based and of course all parts of the bill are to be construed together.

While, therefore, we do not concede that the prayer for relief was intended to be broader than the supporting averments of fact, we submit that even if we be wrong as to this, it cannot be given that effect. It is universally held that issues cannot be enlarged or extended by praying relief which the case made by the bill does not warrant. A special prayer for relief may narrow the issues presented, by not asking as extensive relief as the complainant is entitled to, but it can never be so framed as to enlarge the scope of the bill. This has been many times held by this and other courts.

"A special prayer must, to be available, be supported by the averments of the bill."

16 Cyc. 225.

Station vs. Rising, 103 Ala., 454.

"There must be proper connection and dependency between allegations and relief prayed for."

Thoms vs. Thoms, 45 Miss., 263.

"Relief granted under prayer for general relief must be appropriate to the allegations of the bill."

English vs. Foxall, 2 Pet., 595. Taylor vs. Merchants Fire Ins. Co., 9 How., 390.

"It is a well settled rule that the complainant if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative; so that, if one kind of relief is denied another may be granted; the relief of each kind being consistent with the case made by the bill."

Hardin vs. Boyd, 113 U. S., 756.

"We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill; the case made by the bill consists of the material facts therein stated; and where all the facts are stated it is no reason for denying relief, under a general prayer, because it may differ from the theory of the law upon which the specific prayer for relief is based, where both prayers are based on the same facts, clearly set forth in the bill."

Lockhart vs. Leeds, 195 U. S., 427.

"And if the facts would justify a prayer for any such relief the bill should have been framed with a double aspect. So that if the court should decide against the complainant in one view of the case, it might afford him relief in another."

Hobson vs. McArthur, 16 Pet., 182.

The above authorities show conclusively, we think, that the prayer for relief as distinguished from the allegations of fact is of small consequence in determining the question of estoppel.

As we have shown, the rule is universally established that the party pleading an estoppel by judgment can support his

claim by putting in evidence the entire record of the case relied upon, including the proof taken to sustain the issues joined. Indeed, an important test of whether an estoppel exists is to compare the proof used to sustain the respective allegations of the two suits. In *Stone vs. United States*, 64 Fed., 667, which was affirmed by this court in 167 U. S., 178, it was said:

"One of the safest rules for courts to follow in determining whether a prior judgment between the same parties concerning the same matters, is a bar, is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein."

Again, in *Clarke vs. Blair*, 14 Fed., 812, the court said:

"If different proofs be required to sustain the two actions a judgment in one of them is no bar to the other."

The doctrine is thus stated in *Freeman on Judgments*, 259:

"The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action."

If in fact, therefore, the identity of issues necessary to constitute an estoppel exists in Cause No. 41 Equity and the case at bar, counsel for appellee might naturally have been expected to resort to this "best and most invariable test" and introduce in evidence the testimony taken in both cases in order that it might be compared. They did not do so, however, but the

transcript of record used on the appeal to this court of the case which we have designated as Cause No. 41 Equity, which was numbered 133 on the docket of this court at the October Term, 1905, contains all of the evidence taken and forms part of the records of this court, and if any doubt whatsoever should exist as to the utter dissimilarity of the issues in that cause and in this, we trust that the court will compare the testimony in both cases. It will be seen that in the prior case the testimony of the witnesses examined on behalf of the complainant was devoted exclusively to establishing the purity of the water supply, which was attacked in the city's answer as a ground for the annulment of the franchise, and to showing that the waterworks had been constructed in compliance with the requirements of that instrument. The documentary evidence consisted of copies of the franchise, of the act of the legislature under which the bonds were to be issued, of the deed of trust and deed of foreclosure, and of the ordinances and resolutions of the city council relating to the proposed building of waterworks and issuance of bonds.

In the case at bar the testimony of the complainant, except insofar as it concerns the franchise, the pleadings in the former case, and the resolutions and ordinances relating to the issuance of bonds to construct waterworks, is devoted to an utterly irrelevant recital of every entry on appellant's minutes concerning its various controversies and negotiations with the appellee since the final determination of Cause No. 41 Equity, to a verbose narrative which assumes to tell of the efforts made to compromise various controversies, to an extended and elaborately detailed statement pretending to show the value of the present waterworks, to newspaper articles and circulars, and to similar matters. Every particle of evidence in the second case, except the franchise itself, if it can be so described, concerns things which have occurred since Cause No. 41 Equity was decided. The contract between the parties is, therefore, the only proof used in both cases, and if the evidence

be resorted to as a means to determine whether an estoppel exists, the conclusion must necessarily be reached that the two cases are wholly dissimilar.

An examination of the pleadings and of the testimony in the two cases, and a consideration of the issues, respectively involved, leads necessarily to the conclusion that the only point of similarity rests in the fact that in both cases the water works company sought to enjoin the city from building waterworks. The facts upon which the two controversies were founded were in no wise related. The relief prayed for, however, was the same, and it is upon this coincidence that appellee's claim of estoppel is founded.

In dealing with a similar contention this court in *County of Mobile vs. Kimball*, 102 U. S., 691, said:

"The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other."

The city adopted its plan to build waterworks at a time when the franchise has almost expired to be held in readiness to supply water at that time, many years after the decision of Cause No. 41 Equity, and its rights in the premises depend, therefore, upon a state of facts which has arisen since the rendition of the decree in that case. It necessarily follows that nothing which was decided at that time can constitute an estoppel.

"Of course, a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered"

2 Black on Judgments, Sec. 617.

"If the allegations of a bill refer to the condition of things at the time the bill is filed, the relief afforded must be limited to that state of facts."

Winnipiseogee Lake Co. vs. Young 40 N. H., 420.

"An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding which, though involving the same rights passed upon, is predicated upon facts which have arisen subsequently to the former adjudication."

24 Am. & Eng Ency. of Law, 777.

"The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment cannot be pleaded in bar."

23 Cyc. 1161.

"The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants."

Ib. 1290.

As we have so often said, the water company could not have alleged a purpose on the part of the city which did not then exist to await the practical expiration of the franchise and then build waterworks to operate thereafter, and the city could

not have defended upon the ground that it had the right to do so when indeed it had no such intention. It would have been wholly inconsistent for the city to have answered, as it did, admitting its purpose immediately to build and operate water-works in competition with the water company, and at the same time aver its purpose to construct a plant four years before the expiration of the franchise with no intention to operate it until after that time. When the city defended upon the ground of the invalidity of the franchise and its right and present intention to compete, it excluded all possibility of a decision as to its right at a future time to build a non-competing plant. That issue had not arisen at the time of the decision of Cause No. 41 Equity, and it ought not to require the citation of authority to show that an issue cannot be determined until the facts upon which it must be predicated have occurred. If authority be needed, however, it is found in the decision of this court in *Third National Bank of Louisville vs. Stone*, 174 U. S., 432, where it was said:

"A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen."

Courts refuse to be drawn into the determination of mere abstract principles of law; they decline to construe possible future controversies which have not yet arisen; it is not their province to deal with vague general questions as to the relative rights of parties to contracts and to construe their provisions in advance; they do not decide moot questions.

"Abstract questions of law cannot be made the subject of litigation. There must be real parties and a res in dispute that will become *res adjudicata* when the litigation is determined."

State ex rel Wright vs. Savage, 64 Neb., 684.

"A court will express an opinion upon questions of law when it becomes necessary to do so in determining controverted rights of persons or of property, but it cannot decide moot questions."

State ex rel Westenhaver vs. Lambert, 52 W. Va., 248.

"The courts will not construe contracts until actual issues have arisen from them."

N. O. & N. W. R. R. Co. vs. Lincoln Ferry Co., 104 La. Ann., 53.

The fact that the bill in Cause No. 41 Equity sought injunctive relief is also important as showing that the city's power to do what it now proposes to do could not have been in issue in that controversy. We have pointed out that at the time that suit was instituted the city had no thought of waiting until the practical expiration of the franchise to build waterworks to be operated only thereafter, but on the contrary made the wholly inconsistent claim of its right then to build competing waterworks, and the purpose of the suit was to prohibit such action. The city had threatened to build and operate a waterworks system and subject the existing company to its competition, and the aid of the court was appropriately invoked to prevent this injury. It had never threatened to build non-competing waterworks upon the termination of the franchise and even if this constituted an infringement of the complainant's rights, upon familiar principles, it could not have procured an injunction against the doing of an act which had never been threatened or even contemplated. While it is an important function of courts of equity to prevent threatened wrong or injury, they do not undertake to allay mere apprehension which is founded upon no threat, and upon a possibility which can only arise ten or more years in the future.

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation

and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened so as to be averted only by the preventing, protective process of injunction."

Truly vs. Wanzer, 5 How., 141.

"An injunction will not lie to prevent a possible future injury. A concrete case must be presented."

Richmond R. Co. vs. Louisa R. Co., 13 How., 71.

It follows from what we have said that at the time Cause No. 41 Equity was begun it would not have been possible to have presented the controversy involved in this case for decision. If the bill had set forth in clear and unambiguous terms the city's purpose immediately to build, under existing legislative authority, and operate in competition with the complainant, a waterworks system, and in the alternative that if it should be prohibited from doing this, that it might possibly ten years thence build under authority to be subsequently conferred, a system of waterworks to be operated only upon the termination of the franchise, no court would have undertaken to render a decree enjoining the city from doing both of these things. On the other hand, the city could not have answered the bill in Cause No. 41 Equity by asserting, first, its intention immediately to build and compete, and, second, the possibility that if this right be denied it, it might in the distant future, build with no intention to compete. The bill did not and could not allege the existence of such a future possibility, and if the city had asserted such a right, it would have been wholly irrelevant and unresponsive to the bill of complaint.

If, therefore, neither the complainant nor the defendant, by precise and unambiguous averments, could have put in issue

the right which the city now seeks to exercise, and if the court could not have rendered a decree which in terms prohibited it, how can the averments of the pleadings, by subtle argument and technical refinements, be held to have done indirectly what could not have been directly done, and how can the decree be distorted into holding what the court had no power, under any circumstances, to decide?

While we have undertaken to show that the question here involved could not have been litigated in Cause No. 41 Equity, it must be remembered that it devolves upon appellee to show, not only that it could have been but was in fact adjudicated. This follows from the consideration that the two causes of action or demands are different. As we have said, the courts observe the utmost strictness in applying the doctrine of *res adjudicata* to avoid injustice. Unless the record affirmatively shows that Cause No. 41 Equity could not have been decided without the determination of the questions here at issue, there is no estoppel.

"The general rule of law is that a judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered."

Bigelow on Estoppel, 82.

"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

Washington A. & G. Steam Packet Co. vs. Sickles,
5 Wall., 580.

The case of *Russell vs. Place*, 94 U. S., 606, from which we have already quoted strongly illustrates the reluctance of the courts to hold that the exercise of rights or the interposition of

defenses is barred when they may never have been judicially passed upon. The action was for damages for the infringement of a patent, and the defense was based upon its invalidity. It was urged that this defense was barred because in a prior litigation between the parties a judgment was recovered for damages for a violation of the exclusive privileges secured by the patent. The court, after quoting from a number of its prior decisions, to which we have heretofore alluded, pointed out that the record did not disclose the nature of the infringement for which damages were recovered, that the patent contained two claims, and that it did not appear which was held to have been infringed in the prior litigation. It then said:

"A recovery for an infringement of one claim of the patent is not of itself conclusive of an infringement of the other claim, and there was no extrinsic evidence offered to remove the uncertainty upon the record; it is left to conjecture what was in fact litigated and determined. The verdict may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel, and does not conclude the defendants from contesting the infringement or the validity of the patent in this suit."

We do not see how it can even be contended that the decree in Cause No. 41 Equity, whereby the city was enjoined from constructing and operating a competing system, could not have been rendered without the further holding that it might not in the distant future build waterworks not to compete with the existing company, but only to be operated after its right to furnish water had expired.

Having argued, and we think shown, that the question now

presented was not and could not have been litigated in Cause No. 41 Equity, it is unnecessary, we think, to argue that the decree in that cause could have been rendered without deciding the matter now in issue. The two questions depend upon wholly distinct allegations of fact and utterly different principles of law. To say that one could not be decided without determining the other, is to state an anomaly. And yet the decree of the District Court and its affirmance by the Circuit Court of Appeals can only be justified upon the theory that both tribunals found that the two cases were so identical that the decision of one necessarily and unavoidably involved the determination of the other. We cannot think that these courts in fact reached such an impossible conclusion. It must be, we think, that they misconceived the principles of law upon which the doctrine of estoppel is founded.

Counsel for appellee base their claim of estoppel quite as much upon the opinion of this court as reported in 202 U. S., 453, as upon the decree appealed from, and both the District Court and the Circuit Court of Appeals also founded their conclusion upon that opinion as well as upon the decree. While we do not think that issues can be enlarged by the opinion of an appellate tribunal, we are not only willing but anxious that this court examine its opinion, in order that it may observe the interpretation then placed by it upon the matter in issue. It will appear, we think, beyond a doubt that it never considered the general right of the city to build waterworks for any purpose whatsoever, but confined its decision as it did its discussion to the right to compete with the water company.

In order that this may be made perfectly clear we give herewith a number of quotations from the opinion:

"The suit was brought by the water works company, claiming an exclusive right, as against the city, under a contract with it for the construction and maintenance for a period of thirty years of a system of waterworks, which exclusive contract, it was alleged,

would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act of the legislature of Mississippi, authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000.00 to purchase or construct a waterworks system and a sewer system, and for certain other purposes."

"The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from *erecting* waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded itself from *erecting or maintaining* a system of waterworks of its own during that period."

"The question is now, not whether the city might make a contract giving the exclusive right as against all third persons to *erect, a system of waterworks*, but whether it can, in exercising this legislative power, exclude itself from *constructing and operating waterworks* for the period of years covered by the contract."

"And we think the question of the power of the city to *exclude itself from competition* is controlled in this court by the case of Walla Walla vs. Walla Walla Water Co., 172 U. S. 1."

"In the Walla Walla case the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, *the city might exclude itself from competition*. We think that case is decisive of the present one on this proposition."

"In considering this contract we must remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. *And unless the city has excluded itself in plain and explicit terms from competition with the water works company during the period of this contract, it cannot be held to have done so by mere implication.*"

"Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock and Company, their associates, successors and assigns, the exclusive right to *erect, maintain and operate waterworks* for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, *conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used?* It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be exclusive. Consistently with this grant, can the city submit the grantee to what may be *ruinous competition* of a system of waterworks to be owned and managed by the city, to supply the needs public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the Walla Walla case, that the *competition* of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made

profitable. We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to *erect and maintain* a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, *be shared with another*; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned."

"On the authority of the Walla Walla case, the city had the power to *exclude itself for the term of this contract*, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that, for the term named, the *right of furnishing water to the inhabitants* of Vicksburg under the terms of the ordinances was vested solely in the grantee, so far, at least, as the city's right *to compete* is concerned."

After thus exhaustively and with painstaking care stating again and again that the question under consideration was whether or not the city could compete with the water works company, and after constantly using the words "construct" or "erect" as synonymous with the phrase "erect, maintain and operate," the court concluded its opinion with the following language:

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own waterworks during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and as so modified affirmed."

Although the true scope of the decision and the ground upon which it was founded were made perfectly clear by the opinion, counsel for appellee have seized upon the concluding words as supporting their contention that this court decided that the city cannot build waterworks to be operated after the expiration of the franchise. The discussion of the city's right to build waterworks was confined entirely to its right to compete with the existing company, and after arguing the matter elaborately the court finally based its decision that the city could not thus compete upon the Walla Walla case, which it accepted as conclusive of the city's inability. The Walla Walla case dealt solely with a city's right to exclude itself from competition with the grantee of a franchise, and had not the slightest connection with the question now involved. The resolutions and ordinances of the city upon which this suit is founded expressly deny any intention to compete. The fact, therefore, that the city's right to build was denied upon the authority of the Walla Walla case, is conclusive evidence that the power to build, with no intention to compete was never considered. If this court in fact intended to decide the question now involved it could not have referred to the Walla Walla case as of controlling importance. There is not an argument used in the opinion which is relevant to the question now presented. Not an authority was cited which can be used in the decision of the present controversy. It is inconceivable that under these circumstances the court intended that its opinion should be given the effect claimed. The city's right to build waterworks to be operated after the expiration of the franchise was not alluded to in the pleadings, was not referred to in the decree, was not mentioned in the opinion of the court, depends upon a new and different state of facts, was not necessary to the decision of the prior case, involves entirely different principles of law, and yet it is said that because this court concluded its opinion with the language above quoted, the city is estopped from carrying out its present plan.

As we have pointed out in the opinion the word "erect" was

constantly used as synonymous with the phrase "erect and operate." The court was dealing with the question of the right to compete, and it would have been an unnecessary prolixity for it, each time it had occasion to use the word "erect" to have added language showing that it means to erect with the purpose of competing. No issue was made as to the city's right to erect without competing, and consequently the court was not under the necessity of drawing a distinction between erecting without operating and erecting for the purpose of competition. Counsel, however, have seized upon every paragraph of the opinion in which the word "erect" was used alone and have insisted that the court meant that the city had no right to erect even without competing.

Pursuing the same tactics, they emphasize the fact that the city assigned for error the decree enjoining it from erecting waterworks during the life of the franchise. They argue that because the city used the very language of the decree in assigning error it cannot now contend that that language is open to construction or must be limited to the facts before the court. It was, of course, natural that the assignment of errors should follow the language of the decree. It was never intended to raise the question whether or not the decree was erroneous because it enjoined the city from erecting waterworks at any time and for any purpose, including that now entertained by it.

It was meant to present to this court the city's claim that there was error in enjoining it from erecting waterworks for the purpose of competing with the existing company. It may fairly be said, we think, that appellee's entire claim of estoppel is founded upon a quibble on words. They rely upon the exact language of the decree insisting that it is not open to construction in the light of the controversy pending before the court which rendered it, and they apply precisely the same reasoning to the phraseology of this court's opinion. It would be exceedingly dangerous for courts to write opinions if dis-

connected portions thereof might be applied to conditions which were not present in the minds of the court when they were delivered, and be given a decisive effect as to wholly dissimilar disputes. Recognizing this principle, this court, in *Harriman vs. Northern Securities Co.*, 197 U. S. 244, said:

"General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits."

We feel sure that a reading of the entire opinion will demonstrate that it was never intended to decide the question now presented.

This court had occasion in disposing of the controversy which we have described as Cause No. 97 Equity and which is reported in 206 U. S., 496, to itself define the scope and effect of its opinion in the case we have been discussing. This it did in the following language:

"While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S., 65, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal Court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Water Works Company, under the contract, to carry on the business *without the competition of waterworks to be built by the city itself, as the city had lawfully excluded itself from the right of competition*; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg

Water Works Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to the Constitution of 1890, was not controlled by its provision."

It will be seen that, unlike counsel for appellee, this court construed its decision as relating only to the city's right to compete.

If, however, the court misconstrued its own decision and counsel are correct in their view that it did decide that the city had no right to prepare for its duty of furnishing water to its inhabitants by building a plant to be put in operation upon the termination of the franchise, it is, we submit, singular that it made no allusion to its prior decision in the El Paso case, *supra*. As we pointed out in a former portion of our argument, it was expressly held in that case that by doing what the corporate authorities of Vicksburg now intend, the city of El Paso violated no right of the water company, and the two decisions, if counsel's interpretation be accepted, are utterly irreconcilable. The El Paso case was decided March 5, 1894, and the Vicksburg case in May, 1906, and yet it is said that the former was overruled by the latter, although it was not even alluded to in the opinion. A number of justices participated in the decision of both cases, and it cannot be assumed that when the Vicksburg appeal was decided they were not familiar with the prior El Paso case.

This court, in disposing of the former appeal, could not have decided the question now presented without disregarding many of its prior decisions, a number of which we have heretofore cited, as well as the El Paso case, nor could it have done so without abandoning the fundamental principles of law which require decrees to be construed with regard to the issues presented. An instructive case, which illustrates the liberal attitude assumed by this court in construing decrees, is that of *Conway vs. Taylor's Executor*, 1 Black, 603, which involved a

ferry franchise, which it was claimed had been violated by the owners of a boat known as the "Commodore." A decree was entered perpetually enjoining its owners "from landing the boat called in the pleadings and proof the 'Commodore,' or any other boat or vessel upon that part of the Kentucky shore of the Ohio River lying between the lots of the City of Newport and the Ohio River designated upon the plat of the town of Newport as the 'esplanade' and including the whole open space so designated, for the purpose of receiving or landing either persons or property ferried from, or to be ferried to, the opposite shore of the Ohio, River."

An appeal was taken to the Court of Appeals of Kentucky, which held that the injunction was too broad because it restrained the "Commodore" and the defendants in landing upon the slip in question, persons and property transported from the Ohio shore, and in adjudging the exclusive right of ferrying from both sides of the river to be in plaintiffs. The court expressly held, however, that the defendants "might have been restrained or prohibited, *under all or any circumstances*, from transporting persons or property from this to the other side (within the interdicted distance above or below an established ferry on this side) unless authorized under the laws of this state to do so."

An appeal was taken to this court, which in dealing with the question of the injunction, said:

"Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellant in respect of that trade by obstructing the free navigation of the Ohio. Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below. The counsel for the appellants insists that 'as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth

street, that vessel is enjoined, under 'all or any circumstances, from transporting persons or property' to the opposite shore, unless under authority of the State of Kentucky.'

"We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under 'all or any circumstances, from transporting persons or property' from the Kentucky shore in violation of the ferry rights of the appellees, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport 'persons and property' from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees. Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the Court of Appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice."

It will be seen that it was argued that because the vessel was enjoined "*under all or any circumstances* from transporting persons or property" this language must be given its full literal effect without limitation or proper application to the facts which is the precise contention here made. The court, however, refused to accept this view, and construed the injunc-

tion to mean that persons should not be transported "*in violation of the ferry rights of the appellees.*" It interpolated these words into the injunction in order that it might be upheld. We submit that the same rule should be applied in the case at bar, and that even if the injunction in Cause No. 41 Equity had in express terms purported to restrain the city "from erecting waterworks under all or any circumstances during the life of the franchise" it should be construed to mean that waterworks cannot be constructed during that period in violation of the restrictions imposed by the franchise. The injunction in Conway vs. Taylor's Executor was much broader than in Cause No. 41 Equity, because of the use of the words "under all or any circumstances." The City of Vicksburg was simply enjoined from "erecting waterworks," while the litigants in that case were enjoined "under all or any circumstances" from transporting persons or property.

Although the court did not hesitate to disregard the words "under all or any circumstances" and interpolate in the decree language restricting its operation to the issues it was intended to decide, counsel now insist that the words "under all or any circumstances," or a phrase of similar meaning, be read into the decree under discussion, so that it will have the effect of prohibiting the erection of waterworks under any and all conditions, whether violative of appellee's rights or not.

Prior to the rendition of the decree this court had held in the El Paso case that a city which had granted an exclusive franchise, could nevertheless construct waterworks provided they were not to be operated until after its termination. When, therefore, the City of Vicksburg was enjoined from erecting waterworks during the life of the franchise, it could not have been intended that it be prohibited from erecting them under any and all circumstances, including even a condition and purpose which in the El Paso case had been held to violate no obligation of the franchise.

Moreover, if the decree be construed to prohibit the erec-

tion of waterworks under any and all circumstances, the city would not have the power to do so even if the appellee should do anything to forfeit its franchise or if it should become disabled from performing its obligations thereunder. We submit that the method of interpretation adopted by this court in the Conway case should be applied to the decree now under consideration, and that its true meaning is that the City of Vicksburg cannot erect waterworks in violation of appellee's rights under the franchise. If this construction be adopted the claim of estoppel falls to the ground.

It was held in Cause No. 41 Equity that the erection by the city of waterworks with the intention of competing was a violation of the franchise, and it was accordingly enjoined therefrom. It now proposes to erect waterworks under wholly different conditions and for an utterly dissimilar purpose, and the question of whether in so doing it will violate appellee's rights under the franchise is open for consideration.

There can be no doubt whatever that the question now presented has never been in fact adjudicated, and if it shall be held that the city is estopped from asserting its right to build waterworks by way of preparation for the performance of its duty to furnish water when the present means of supply ceases, it will indeed have been condemned unheard.

THIRD.

APPELLEE IS NOW ESTOPPED TO ASSERT THAT THE CITY CANNOT ERECT A WATERWORKS SYSTEM TO BE OPERATED AFTER THE TERMINATION OF THE FRANCHISE.

It is alleged in the answer, and shown by the testimony that from time to time, beginning in the early part of 1910, the city has laid water mains under such streets as it has paved,

with the intention that they should finally form part of a system of waterworks which the city contemplated building and operating after the expiration of the present franchise. These mains were laid because of the city's desire to avoid the necessity of tearing up and thus mutilating new pavements in order to lay mains and make connections with the premises of abutting property owners.

Just before the case at bar came on for hearing in the District Court at the January Term, 1912, the city had advertised for bids and was about to lay other mains under streets which it proposed to pave when appellee procured a temporary restraining order prohibiting it from so doing on the ground that mains are part of a waterworks system and that it was precluded by the franchise from erecting any portion thereof. This temporary restraining order was made permanent in the final decree.

Long before the restraining order was granted, or this suit filed, beginning, as we have said, early in 1910 and continuing over the intervening years, the city had laid mains, for which it had paid sums amount to about \$30,000.00, and although the contracts and proceedings incidental thereto were matters of public notoriety and were within the knowledge of the Vicksburg Water Works Company, it made no protest on the ground that its franchise prohibited the city from building waterworks. The testimony shows that on the contrary it wrote two letters to the City of Vicksburg, dated Oct. 16, 1910, in which it assumed the position that the city had the right to lay water mains of its own, provided they were first authorized by a vote of the people. This is wholly inconsistent with the suggestion that the franchise prohibits the laying of such mains, because if it does the people could not by their vote change the obligations of the contract.

The record further shows that after the writing of these letters the receiver of the water works company in its behalf instituted two suits, one in the District Court and one in the

Chancery Court of Warren County, Mississippi, against the contractors who had laid certain of the water mains in question, seeking to recover for and on behalf of the city, though against its protest, the amounts paid them on the theory that the contracts for the laying of the mains were illegal because the city had exceeded its debt limit.

These things constitute not only an estoppel to say that the laying of the mains was prohibited by the franchise, but are of the utmost importance as showing an acquiescence in the construction placed by the city on that instrument. It is a well known principle of law that the courts will accept wherever it is possible to do so, the construction placed upon a doubtful contract by the parties thereto. Inasmuch as the water works company was endeavoring to prevent the laying of water mains, and conceded that the city had a right so to do, if authorized by its people, this was a contemporaneous construction by both parties to the contract that it did not have the effect now claimed for it.

"In cases where the language used by the parties to a contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

Topliff vs. Topliff, 122 U. S., 121.

We submit that the general principles of estoppel in pais apply in full force to the present situation. The water works company and its receiver, have with full knowledge permitted

the city to expend about \$30,000.00 in laying water mains without ever asserting that it was prohibited by the franchise. After waiting several years during which they acquiesced in the city's right to lay these mains, they now come into court and say that it is forbidden by the franchise. If the city shall now be prohibited from laying any other water mains or from building a waterworks plant, the \$30,000.00 heretofore expended with the full knowledge and acquiescence of the water works company, will be absolutely thrown away. If that company conceived that the laying of the mains violated its franchise it was its duty to say so, so that the city could save itself the unnecessary expenditure and consequent loss of this large sum of money. The silence of the water company has thus misled the city to its hurt and it is estopped now to speak.

Philadelphia W & B. R. R. vs. Dubois, 12 Wall. 47.

The truth of the matter is that the idea that the franchise or the former decree of this court prohibits the city from constructing waterworks to be operated after the termination of the franchise, never occurred to appellee until within the last year. There cannot be the slightest doubt that if they had entertained such a thought before they would at once have endeavored to prevent the laying of the mains on that ground.

FOURTH.

THE CITY SHOULD NOT BE ENJOINED FROM ERECTING WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE, FOR THE REASON THAT SUCH A DECREE WOULD AT THIS TIME BE INEQUITABLE.

We have shown, we think, that the relative situation of the parties to this controversy is wholly different from that which existed at the time of the rendition of the decree in Cause No. 41 Equity. As we have pointed out, at that time the

franchise had many years to run and the city was denying its validity and proposed to build a waterworks system to be operated at once in competition with the water works company. Now the franchise is about to expire, the city recognizes its validity and concedes that up to the moment of its expiration it must permit the full and free exercise of the privileges and rights conferred thereby, and only intends to build waterworks to be put in operation after the rights granted by the franchise have terminated. Whatever, therefore, may have been the relative equities of the parties at the time of the prior hearing, they are now wholly different and we submit that without regard to the technical meaning of the former decree the situation is so changed that it would be inequitable to enforce it in the manner sought by the bill of complaint. Appellee having come into a court of equity, as complainant, asking equitable relief, has not the right to insist that the decree be literally enforced, when by reason of the changed situation of the parties, it would be inequitable so to do.

This was expressly held by the Circuit Court of Appeals of the Eighth Circuit in *St. Louis, etc., R. Co. vs. Wabash R. Co.*, 152 Fed., 849. The court said:

"Finally, counsel contend that this is not a 'hard and fast' decree; that the Colorado Company is applying to a court of equity to enforce it; that the court should not grant inequitable relief; and that any broader relief than that given by the decree challenged by this appeal would be of this character.

"A decree for the joint use of railway facilities may be fair and just when rendered, and such radical changes may subsequently be wrought that its continued enforcement would work great injustice. A court of equity always has the power and the judicial discretion to refuse to compel inequity and to condition the relief it grants with the requirement that he who seeks equity shall do equity. If such changes in the situation, rights or relations of these parties had occurred subsequent to the entry of this decree that its

continued enforcement would be unjust, the courts would withhold their aid or condition it by new and equitable terms. But the original decree was conclusive of the rights and remedies of the parties at that time and thereafter until subsequent changes of conditions rendered some modification of the relief it granted just and equitable."

FIFTH.

THE BONDS WERE LEGALLY AUTHORIZED.

While both the District Court and the Circuit Court of Appeals based their holdings solely upon the ground of estoppel, the decree appealed from not only enjoins the city from building waterworks at all, but specifically enjoins it from issuing the bonds which were authorized at the election held shortly before the bill was filed.

It will no doubt be argued that even though it be held that the city has a right to build waterworks, the portion of the decree enjoining the bond issue should be affirmed. The validity of the bonds was attacked by appellee in his capacity as a tax-payer of the City of Vicksburg, and as to this feature of the case the jurisdiction of the District Court was invoked upon the ground that appellee is a citizen of Tennessee.

We will briefly discuss some of the grounds upon which the bonds are attacked.

It is claimed that the failure to give notice of the intention to issue them, as required by the city charter renders the bonds invalid.

It is unnecessary to discuss this question, because of the enactment by the legislature of Mississippi of a curative act, which is published on page 124 of the Acts of 1912, and is printed as Appendix A. hereto. This act expressly validates "all municipal bonds heretofore authorized by a legal majority of the qualified electors thereof voting at an election held for that

purpose to be issued when the municipal authorities have failed to take any of the preliminary legal steps for the issuance of said bonds."

This act was declared by the Supreme Court of Mississippi in the case of Griffith vs. Vicksburg, 58 Southern, 781, not yet officially reported, to be valid and to have the effect as intended, to cure all defects in matters of detail and preliminary proceedings. The suggestion is made in the bill of complaint that it is local legislation and that as it was not referred to the committee on local legislation as required by the constitution of Mississippi, it is void. As it expressly applies to every city in the State and has been held valid in the Griffith case, this contention cannot have been seriously made.

It is also suggested that because some persons were permitted to vote who had registered within four months prior to the bond election, it was invalid. The evidence shows that the bonds were authorized by so great a majority of the votes cast that no matter how those persons voted the result would have remained unchanged, and it was expressly held in the Griffith case that the election was not and could not have been affected thereby. Of course, upon elementary principles, the decision of the Supreme Court of Mississippi in construing its own statutes will be followed by this court, where no constitutional or other federal question is involved.

It is also urged that the Act of 1910, which is printed as Appendix B, hereto, under which, as well as the city charter, the bonds were authorized, is invalid because it applies insofar as concerns an indebtedness in excess of 10 per cent. of the assessed valuation of a municipality, only to those cities having more than 10,000 inhabitants. It is said that this is not a proper classification, and that the law, therefore, violates the constitutional provision prohibiting the enactment of special legislation in cases which can be covered by general laws. There are a great many decisions upon similar statutes, and it is a general principle that there must be some proper basis

of classification. This court in the case of *Waite vs. Santa Cruz*, 184 U. S. 302, held that:

"The subject matter of the act in question—the funding of municipal indebtedness—is peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population."

It expressly held that the act which classified cities according to population as regards their power to issue bonds, was not special legislation and was valid under a constitutional provision similar to that of Mississippi. We regard this case as conclusive.

It is also contended that because the city expended about \$129.00 in the publication of three newspaper articles and in the publication and distribution of a report made by Mr. A. L. Dabney, an engineer employed by it to plan a system of water-works and to estimate the value of the existing plant, the election is thereby rendered invalid. It is said that it was the city's duty to act merely as an umpire and religiously to abstain from influencing in any way the opinion of any of its voters, and that, moreover, the courts will pass upon the question of whether or not any voters could have been misled by anything which was done, written or said. The matter is thus disposed of in 1 *Dillon on Municipal Corporations*, 5 Ed., Section 213:

"In determining whether the requirements of the Constitution or statute have been complied with, the courts cannot inquire into the motives prompting persons to vote on questions submitted, where the voter freely and voluntarily exercises his right. Inducements in the way of statements and representations made to influence a voter although false and fraudulent, will not invalidate the election, if it does not ap-

pear that by force and fraud the voter was compelled to vote a way he had not desired to vote."

The same principles are enunciated in the case of *Epping vs. City of Columbus*, 117 Ga. 296, in which the court said:

"It is contended that the bonds should not have been validated because at least 32 negro voters who voted in favor of the issuance of bonds were induced to do so by false and fraudulent statements made to them by officers of the town and others interested in the issuance of the bonds. This is no ground for refusing to validate the issue of the bonds. The courts cannot inquire into the motives prompting persons to vote on questions of this character, where the voter freely and voluntarily exercised his right. Inducements held out to influence a voter, although false and fraudulent, will not invalidate the election. The rule might be different where it appeared that by force and fraud the voter was compelled to vote in a way he did not desire to vote. The allegation of the objection in the present case did not bring the case within the purview of this last statement, even if that would be the rule. Where the election is regularly called, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them may have been misled by some one interested in the result of the election."

We have been unable to find any intimation or suggestion except those of counsel for appellee that it is a city's duty to be merely an umpire and to refrain from seeking to influence the result of a bond election. It is immaterial whether or not the city funds were properly spent in the publications complained of, and even if they were not, that fact could have no bearing upon the question of the validity of the bonds.

Any other rule than the one announced in the authorities we have cited would lead to the most hopeless confusion and

few elections could ever be adjudged legal. If the courts, at the instance of any tax-payer are to inquire into the motives which influenced each voter in the election, and as to the truth or falsity of all of the statements made and arguments used during the preceding campaign, there will literally be no end to litigation. Each case would involve a thousand collateral issues, and the result would be confusion worse confounded.

Aside from all this, there was an utter failure to show that anybody was influenced in any way, properly or improperly, by anything that was said or done.

It is even contended that because the suggestion was made that if the bonds were authorized the existing plant might perhaps be purchased at a lower price than that demanded by its owners, this constituted an attempt to bribe the voters by holding out to them an improper inducement to vote for the bond issue.

Reliance is had upon cases holding that where a candidate for election to office made any promises or statements whatsoever which could have the effect of inducing persons to vote for him upon the idea that either they or the public would be benefited financially by his success, the election was vitiated. Some of these decisions go so far as to hold that where a candidate for office offered to remit his salary the election was nullified thereby. There is a manifest distinction between elections to determine the issuance of bonds and elections to office. The very purpose of issuing bonds is to benefit financially or materially the municipality or other governmental agency which issues them, and it has many times been held that it is not only legitimate but proper that such anticipated benefit should be explained to the voters for their information.

This distinction was drawn in the case of *Perkins County vs. Graff*, 114 Fed., 441, in which the court said:

"The first ground upon which the validity of the bonds and coupons in issue is challenged is that the

voters of the county were bribed to vote for their issue, because the proposition of the irrigation company, which they voted to accept, contained the offer 'to give employment in the construction of said canal to bona fide residents of Perkins County, Nebraska, so far as it shall not conflict with the completion of the work at the time herein stated.' But there was no corrupt or illegal inducement in this proposal. When electors are called upon to choose between great moral or political principles or between candidates for official positions, the use of any pecuniary inducement to sway the choice of the voter is illegal and corrupt. But there was no choice of principles or of persons involved in the question whether or not this county should aid the construction of this canal.

"When the question to be determined is whether or not public aid shall be given to the construction of an internal improvement within a county, city or other political division of a state, the primary question is whether or not the improvement will be of pecuniary benefit to the political subdivision and its people. The very purpose of the submission of the question to the voters is to enable them to balance in their own minds the pecuniary advantages and disadvantages which their county, city or precinct will derive from the improvement, and the taxation which must follow the aid to its construction proposed; and it is both lawful and proper that they should consider and be influenced by the gain or loss which, in their judgment, its construction will entail upon themselves and their county or city."

A similar ruling was made by the Supreme Court of Michigan in the case of Board of Supervisors vs. Wayne Circuit Court, 106 Mich., 166.

The validity of the bonds was attacked upon other technical grounds which were not set up in the bill of complaint and were not seriously urged.

Our argument has already assumed such great proportions that we will not refer to these other matters.

We trust that the great importance of this case to the City of Vicksburg and its people will serve as an apology for our prolixity.

Respectfully submitted,

T. C. CATCHINGS,
O. W. CATCHINGS,
GEORGE ANDERSON,
JOHN BRUNINI,
Solicitors for Appellant.

APPENDIX A.

CHAPTER 126.

S. B. No. 460.

AN ACT to validate all municipal bonds heretofore authorized by a legal majority of the qualified electors thereof voting at an election held for that purpose to be issued when the municipal authorities have failed to take any of the preliminary legal steps for the issuance of said bonds, and for other purposes.

Validating Municipal Bonds Heretofore Issued and Defective:

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That all municipal bonds heretofore authorized to be issued by a two-thirds majority of the qualified electors of a municipality voting at an election held for that purpose, under the provisions of Chapter 142 of the Acts of the Legislature of 1910, and of Section 3419 of the Code of 1906; or under the provisions of any municipal charter substantially in terms with the above statutes, but which have not been actually issued, notwithstanding the municipal authorities have failed to publish notice of their proposal to issue said bonds as required by said statutes or charter, or may have failed to take any of the preliminary legal steps toward the issuance of said bonds prescribed thereby, be and they are hereby in all things made valid and legal and when so issued the same shall be a binding obligation on the municipality issuing the same; and the provisions of this Act shall apply to all municipalities, whether they are operating under the municipal chapter or under their own private charter.

Sec. 2. That this Act take effect and be in force from and after its passage.

Approved March 4, 1912.

APPENDIX B.

CHAPTER 142.

H. B. No. 284.

AN ACT to provide for the issuance of bonds for municipal corporations for the construction or purchase of public utilities and public improvements, and to repeal Section 3415 of the Code of 1906, and an Act entitled 'An Act to amend Section 3014 of the Code of 1892, to authorize cities of ten thousand or more inhabitants to issue bonds for the purpose of improving or paving streets,' approved April 14th, 1905; and also an Act entitled 'An Act to amend Section 3415 of the Mississippi Code of 1906, as to bond issues of municipalities,' approved March 20, 1908.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the corporate authorities of any municipality, whether operating under Chapter 99, of the Code of 1906, or not, for the purpose of raising money for the erection of municipal and school buildings and the purchase of such buildings or land therefor, and the improvement and adornment thereof, for the erection and purchase of water works, gas, electric and other plants, the establishment of a sewerage system, the protection of a municipality from overflow, from caving banks and other like dangers, improving or paving streets and sidewalks, and for the liquidation of existing debts of the municipality, may issue bonds or other obligations of the city, town or village, not to exceed in amount, including all outstanding bonds, seven per centum of the assessed value of the taxable property of the municipality, unless authorized by a two-thirds majority of the qualified electors thereof, voting at an election held for that purpose, but in no case shall the amount exceed ten per centum of the assessed value. Except that the amount that may be issued by cities having 10,000 or more inhabitants for

the purpose of improving or paving streets or sidewalks, or constructing or otherwise acquiring water works, gas or electric plants, may exceed ten per centum, but in no case to exceed fifteen per centum of the assessed value, which shall be submitted to an election as above. But the limit on the amount shall not apply to bonds or other obligations, issued for liquidation or to raise funds to liquidate any indebtedness when this Act becomes operative, or to bonds, the proceeds of which have been invested in enterprises producing or saving sufficient revenue over and above their operating expenses to pay the interest on these bonds.

Sec. 2. That whenever bonds shall be issued for the construction or purchase of water works, gas or electric plants, the corporate authorities of the city or town so issuing them may provide by ordinance, resolution, contract or otherwise, that the said bonds shall be secured by pledge of the revenue of the said water works, gas or electric lighting plants to be constructed or purchased, with the proceeds thereof.

Sec. 3. That Section 3415, of the Code of 1906, and An Act to amend Section 3014, Code of 1892, to authorize cities of ten thousand or more inhabitants, to issue bonds for the purpose of improving or paving streets, approved April 13, 1906; and also An Act entitled 'An Act to amend Section 3415 of the Mississippi Code of 1906, as to bond issues of municipalities,' approved March 20, 1908, be, and the same are hereby repealed; provided, however, that this Act shall in no way affect the validity of any bonds which may heretofore have been authorized at an election held under any existing law whether the bonds so authorized have been actually issued or not, and shall not affect or repeal any private or local laws now in force and effect, authorizing the issuance of bonds for any purpose.

Sec. 4. That this Act shall take effect and be in force from and after the date of its passage.

Approved April 5, 1910.

FILED.

OCT 13 1913

JAMES H. MCKENNEY,

CLERK.

United States Supreme Court.

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Appellants,

against

W. A. HENSON, Receiver of the Vicksburg Waterworks
Company, and LELIA BOYKIN,

Appellees.

BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

*Appeal From the United States Circuit Court of Appeals
for the Fifth Circuit.*

EDGAR H. FARRAR,
J. C. BRYSON,
JOSEPH HIRSH,
RICHARD F. GOLDSBOROUGH,
Solicitors and Counsel for Appellees.

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<i>Id.</i> p. 738	p. 21
<i>Id.</i> p. 736, Note 23	p. 21

<i>Id.</i> p. 737, Note 24.....	p. 21
<i>Id.</i> p. 737, Notes 25 to 27.....	p. 22
Ency. P. & P., Vol. 3, pp. 362 and 363.....	p. 38
<i>Id.</i> Vol. 8 p. 740.....	p. 38
<i>Electrolibration Co. vs. Jackson</i> , 52 Fed. Rep. 773.....	p. 38
<i>Fayerweather vs. Ritch</i> , 195 U. S. 276.....	pp. 42, 43, 59
<i>Hine vs. Morse</i> , 218 U. S. 493.....	p. 43, 44
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<i>Samuel Cupples Envelope Co. vs. Lackner</i> , 99 N. Y. App. Div. 231 (90 N. Y. Supp. 954).....	p. 38
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<i>Sioux Falls vs. Farmers' Loan & Trust Co.</i> , 69 C. C. A. Rep. 383.....	pp. 63, 66, 67
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<i>Texas vs. White et al.</i> 22 Wall., 157 (22 L. Ed. 819)	p. 38
<i>Tioga Railroad Co. vs. Blossburg and Corning Rail- road Company</i> , 20 Wall. 137 (22 L. Ed. 331) ..	p. 42
<i>Vicksburg Waterworks Co. vs. Vicksburg</i> , 185 U. S. 65	pp. 5, 24, 25
<i>Vicksburg vs. Waterworks Co.</i> , 202 U. S. 453....	pp. 15, 27, 29, 51, 62, 63, 65, 68
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United States Supreme Court.

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Defendants—Appellants,

against

W. A. HENSON, Receiver of the Vicksburg Waterworks
Company, and LELIA BOYKIN,

Complainants—Appellees.

BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

*Appeal From the United States Circuit Court of Appeals
for the Fifth Circuit.*

STATEMENT OF THE CASE.

A detailed analysis of the pleadings is contained in the brief on the motion to dismiss the appeal. It is unnec-

cessary to repeat that analysis here, as nothing is now left in this case on the merits except the three questions arising out of the claims of the receiver in respect to the Bullock franchise. Those three questions are:

FIRST. Is the decree entered in what is known in the record as Case No. 41, *res adjudicata* of the issues in this case?

SECOND. If that decree is not *res adjudicata* on the question of the right of the city to erect and maintain, prior to November 18, 1916, in the City of Vicksburg, a waterworks system, and to enter upon and use the streets, alleys and public places of said city to lay mains and pipes and construct hydrants for the purpose of supplying water for public and private purposes after the company's franchise shall expire on November 18, 1916, then is the city so precluded by the terms of the exclusive franchise granted the company (complainant and appellee)?

THIRD. Is the complainant (the company) estopped from urging these claims because it made no objection on these grounds to the city's action in 1910 and 1911 in laying some scattered mains, at a cost of about \$30,000, in streets about to be paved?

In order to make clear these contentions it is necessary to state in detail the facts in respect to the franchise owned by complainant, the litigation between complainant and defendant in respect to said franchise, and the acts of complainant in regard to the laying of the mains by the city on certain streets.

On November 18, 1886, the City of Vicksburg, under due legislative authority, and after receiving competitive

bids, granted to Samuel R. Bullock & Co., their successors and assigns,

"the EXCLUSIVE right and privilege * * * for the period of thirty years * * * of erecting, maintaining and operating a system of waterworks" (in accordance with the terms and provisions of the ordinance) "and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, as they now exist or may hereafter be extended, and within such other territory, as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water to the City of Vicksburg and to its inhabitants for public and private use, and for making repairs and extensions to said system from time to time during the period in which this ordinance shall be in force."

See *Record*, pp. 3-4, where above is quoted in present Bill (No. 119); and *Rec.*, top of p. 50, where the franchise is made Ex. A to amended bill in *present* suit (No. 119); *Rec.*, p. 107, where above is incorporated in Bill in No. 41 (the *former* suit) as *Exhibit B*. (*Rec.*, pp. 98-105, containing entire franchise as Ex. B in No. 41 and Ex. A in No. 119.)

The ordinance specified the most elaborate details for the construction of the plant, and for its test and acceptance by the city.

The city reserved to herself the right and privilege of buying this system of waterworks at the expiration of each period of ten years during the life of the ordinance, on giv-

ing a year's notice, and the contract provided for a method of determining the value to be paid by the city—i. e., the city and the grantee each to appoint a hydraulic engineer, and these two appointees name a third hydraulic engineer, the three constituting a board to fix the value to be paid by the city in cash within sixty days from the date of the board's award.

The city rented from the grantee for thirty years eighty double-nozzle frost-proof hydrants at sixty-five dollars per annum, and, after the first year of operation, rented ten more such hydrants for the balance of the franchise.

Free water was to be furnished for named specific and limited purposes and designated public institutions.

The grantee was to extend its mains on demand upon certain conditions, and was to regulate the prices to be paid for water by private consumers not to exceed designated limits.

The works were built, tested and accepted by the city, and for fourteen years there seems to have been no serious friction between the parties.

The property and franchises by various changes in ownership became vested in the Vicksburg Waterworks Company.

In *March, 1900*, the Legislature of Mississippi passed an act entitled "*An Act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000 to purchase, or construct, equip and maintain a waterworks system, etc.*"

Thereafter the City of Vicksburg acted as follows:

FIRST. Held an election on July 3, 1900, in pursuance of said act of the Legislature, at which it was voted that said city should issue its bonds in the sum of \$150,000 to buy or construct waterworks for said city.

SECOND. Passed an ordinance on November 7, 1900, instructing the Mayor to notify the Waterworks Company that the city denies any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, the city will pay reasonable compensation for the use of said hydrants; and that the City Attorney take such action as shall be necessary to determine the rights of the city in the premises.

THIRD. Instituted a suit in the Chancery Court of Warren County seeking to annul and destroy said Bullock franchise, averring that the city no longer recognized any liabilities under said contract, and that said contract no longer exists.

Thereupon, in February, 1901, the Vicksburg Waterworks Company filed its bill in the Circuit Court of the United States, being No. 41 of its docket, against the City of Vicksburg to protect its franchise and contract from the acts and doings of the city's authorities, claiming the protection of the contract clause of the Constitution of the United States. This bill was dismissed for want of jurisdiction, and the cause came directly to this court, where the decree below denying jurisdiction was reversed, and the cause remanded.

See *Vicksburg Waterworks Co. vs. Vicksburg*, 185 U. S., p. 65, where the case is stated in full.

Looking at the pleadings more in detail, it appears that in the original (*Rec.*, p. 106) and *amended and supplemental* bill (*Rec.*, p. 24), the complainant set out in full its contract and franchise, and made the Bullock grant (*Rec.*, p. 107) an exhibit (*Ex. B. Rec.*, pp. 98-105) to its bill, and re-

averred its reliance thereupon in its *amended and supplemental bill* (*Rec.*, at top p. 26); averred its compliance therewith (*Rec.*, p. 108 and pp. 109-110) and the acquiescence therein of the defendant for fourteen years (*Rec.*, p. 108 and p. 110); averred a conspiracy by the Mayor and Aldermen to injure and destroy the credit and business of complainant (par. 13 at pp. 110-111 of *Rec.*); averred that the act of the Legislature of 1900 (*Rec.*, p. 111 and p. 24) and the ordinances (par. 16, *Rec.*, p. 112 and pp. 24 and 26) of the city alleged to have been passed in pursuance thereof were in violation of the Constitution of the United States, inasmuch as they impaired the obligation of the Bullock franchise and contract because by said act the Legislature assumed to annul and abrogate the Bullock franchise and contract in this, that by reason of said ordinance and contract the city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock and Co., or their assigns, notwithstanding which said act authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks at the arbitrary price fixed by the legislative act, * * * and said ordinance (*Rec.*, p. 112, par. 16 and p. 24 and 26), in pursuance thereof was passed and an election authorizing an issue of bonds thereunder to purchase or construct waterworks was held (*Rec.*, p. 111 and pp. 24-25), etc.—all of which acts and doings on the part of said city and the Legislature of Mississippi, impaired the credit of the Vicksburg Waterworks Company and depreciated the value of its property, and tend to disable it from carrying on its business and to coerce it to sell its property for such arbitrary and inadequate price, and cast a cloud upon its title, franchise and rights (*Rec.*, pp. 111-112);

averred, as a conclusion of law, that by said Bullock franchise the city was precluded from issuing and selling bonds—

*"Therefore, said City * * * is precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own in competition with complainant against its own contract."*

(Rec., p. 26.)

There was another and independent section in the bill, being Section 25 (Rec., pp. 114, 115), which averred that this act was unconstitutional because the Legislature of the State had by said act passed a law "impairing the obligation of a contract," the same having been passed "while said contract and ordinance" (meaning the Bullock contract and ordinance) "was still in force, and the condition thereof being performed by both parties without complaint from either."

This is a broad and unlimited attack on the statute as being in contravention of the contract clause of the Constitution of the United States, setting up the contract and ordinance on the one side and the statute on the other, and, therefore, calling for an examination of the whole contract from every aspect in which it was or could be contravened by the statute, or any acts and doings of the City of Vicksburg under its provisions or by virtue of its authority.

The prayer of the bill and supplemental bill was:

FIRST. For general relief.

SECOND. That defendant be enjoined perpetually from assuming to abrogate and take away the franchise and contract rights of complainant, and from endeavoring to dis-

able complainant from carrying on its business, and to destroy its credit and the value of its property, and coerce said complainant to sell its waterworks to defendant for an inadequate price, and from otherwise carrying on the unlawful conspiracy entered into by it, and from doing any other illegal and unlawful act in furtherance of said unlawful conspiracy.

THIRD. That the act of the Legislature of Mississippi, adopted March 9, 1900, and the resolution and ordinance adopted and passed by the city on November 7, 1900, be decreed to impair the obligations of the contract between Bullock & Company and the city, and to cast a cloud upon the title, franchise and rights of complainant, and to be invalid and of no effect as against your orator. (Rec., p. 119.)

FOURTH. That defendant be enjoined from issuing and selling bonds for the purpose of building and constructing waterworks of its own in competition with your orator.

"And in addition thereto that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract."

Rec., p. 26.

Thus, in the amended and supplemental bill (Rec., p. 26) was the city put upon notice that a decree was asked, giving *the specific relief* of an injunction *against the construction* of waterworks by it *for any and all purposes*, "in addition" to an injunction against the construction for the sole purpose of competition.

The defendant by its answer (Rec., p. 27) admitted the passage of the act and ordinances complained of; admitted the execution of the Bullock contract in the words and

figures set forth; averred that the exclusive privilege contained in said contract was unauthorized, illegal and void; denied the validity of the chain of title by which the Vicksburg Waterworks Company claimed to be the owner thereof; denied that the complainant had complied with the terms of said contract; denied that the question of liability of defendant on the Bullock contract depended on the legislative act of 1900, and averred that the ordinance denying liability on the contract was not adopted in pursuance of said act, and that no liability existed on said contract for many reasons set up in the answer, irrespective of the act; denied that the resolution complained of was adopted or that the suit was instituted in the Chancery Court of Warren County in pursuance of the act of the Legislature, or to injure the complainant's property, or to coerce it to sell its works at an inadequate price; averred that the legislative act "merely confers authority upon respondents, which is optional with them, but is not mandatory or obligatory upon them, to take action"; that the bill does not charge that said city intends to build any works, or has taken any action for that purpose, and, in fact, that the wisdom and policy of building any works cannot be considered and determined until it first be ascertained whether they are bound to complainant by said contract; that before the question of building a sewerage system and waterworks can be entertained by them they deem that it is proper that there should be first settled their liability, if any, under said contract; that they consider it is their duty as public servants to test said question, not only because of the onerous terms of said contract, but also because the public welfare requires that said question be settled, for they might justly conclude that it would be unwise to build a system of waterworks in case it should

be decided that they are bound by said contract, though they may have the legal right to build,

"so that they say that said resolution was not adopted in pursuance of said act of the Legislature, or by virtue of it, but solely to test said question, as an official duty which they owe, first, that they should not acknowledge a burdensome liability upon the taxpayers which they do not believe to exist, and, second, that they might act advisedly in determining what action, if any, should be taken by them in the exercise of the authority to build or buy a waterworks plant."

Rec., pp. 38, 39.

For present purposes, the gist of this confusing "answer" (which is, in content, a composite pleading containing a demurrer and plea as well as an answer) is to be found in the defenses putting in issue *both* of the following separate and separately stated specific demands for interpretation of the Bullock contract contained in the bills: (1) That the interpretation be such that the city be enjoined from "building and constructing waterworks of its own in competition" * * * (2) that the interpretation be such that the city, "*in addition*," be enjoined from "constructing waterworks of its own" during the franchise.

As already stated, the Bullock contract was pleaded in full in the bills. The above quoted specific conclusions of law therefrom, which the Court was asked to draw, were put in issue:

FIRST...*By demurrer* contained in the answer. (See last paragraph on page 44 of record.)

"Respondents further answering, say that the matters and things contained in complainant's amend-

ed and supplemental bill are irrelevant, immaterial and afford no ground for relief to the complainant and their legal sufficiency is now submitted to the Court and judgment thereof is craved, *as if formally demurred to.*"

Quotation from answer in No. 41 at page 44 of the Record. (Our ital's.)

SECOND. By a general denial contained therein. (See last three lines on page 44 of the record.)

"and respondents further answering say: That there does not appear any ground for the equitable relief sought by the complainant by reason of the matters and things averred in its original and amended bills."

Quotation from answer in No. 41; Rec., p. 44.

THIRD. By an inferentially specific denial. (Rec., p. 29, from and including the third line from the top of that page to the end of the quotation on that page from the Bullock contract.)

"These respondents *admit* that there is a provision in the contract made between the city and Samuel R. Bullock & Co., whereby the exclusive right is given to Samuel R. Bullock & Co., their successors and assigns for the period of thirty (30) years to maintain a system of waterworks and to supply said city and its inhabitants with water.

"That said provision is in words as follows: 'That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, into Samuel R. Bullock & Co., their associates, successors and assigns of erecting, maintaining and operating a system of waterworks in accordance with the terms

and provisions of this ordinance, and of using the streets alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use and for making repairs and extensions to said systems from time to time during the period in which this ordinance shall be in force."

Quotation from answer in No. 41; Rec. p. 29.
(Our *itals.*)

The inference that this is in substance a specific denial is strengthened (if anything to render the inference more certain be deemed essential) by considering this language of the answer at page 29, in conjunction with the general denial and demurrer above referred to (Rec., p. 44), and with the averments therein from the eighth line from the bottom of page 38 of the record to and inclusive of the first seven lines from the top of page 39. (See page — below.)

"In fact respondents say that the wisdom and policy of *building any works* cannot be considered and determined until it be first ascertained whether they are bound to complainant by said contract.

"That before the question of building a sewerage system and waterworks can be entertained by them, they deem that it is proper that there should first be settled their liability, if any, under said contract; they consider that it is their duty as public servants to test said question not only because of the

onerous terms of said contract, but also because the public welfare requires that said question be settled, for they might justly conclude that it would be unwise to build a system of waterworks in case it should be decided that they are bound by said contract, though they may have the legal right to build."

Quotation from answer in No. 41 at pages 38-39 of Record. (Our italics.)

On these issues the parties went to trial, and after hearing the following final **decree** was entered (Rec., p. 46) :

"FIRST. That the defendant * * * be, and is hereby, perpetually enjoined from abrogating or taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant entitled; * * * and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by, and is the sole and exclusive property of, said complainant.

"SECOND. That said ordinance, contract and franchise be, and is hereby, *declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts,* or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by defendant thereunder.

"THIRD. That said defendant be, and is hereby, directed to rescind its resolution and ordinance adopted the 7th day of November, 1900. * * *

"FOURTH. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9, 1900, and from *issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own, during the period prescribed in said ordinance and franchise.*

"FIFTH. That the said defendant **refrain from constructing waterworks of its own** until the expiration of the period prescribed in the said ordinance, contract and franchise dated 18th day of November, 1886."

The balance of the decree is immaterial to any issue in this case.

The defendant appealed directly from this decree to the Supreme Court of the United States, and assigned as error the following (p. 122), of which only the fifth and sixth assignments are pertinent to this case:

"V.

"The said Court erred in rendering the final decree against respondent because said decree is contrary to the law and the facts as stated in the pleadings and proof before said Court.

"VI.

"The said Court erred in perpetuating by its final decree the injunction against respondent, restraining it from erecting a water plant of its own."

This appeal was heard in *this court*, and the decree of the lower Court, as covered by these assignments, was specifically affirmed (see *Vicksburg vs. Waterworks Company*, 202 U. S. 453 *et seq.*), the Court saying (p. 472) :

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

In regard to the facts on which the appellee's *claim of estoppel* is based, there is nothing in this record except what is found on pages 195 and 196 (being the testimony of Crumpler) and on pages 202, 203 and 204.

ARGUMENT

I.

*On the proposition that the litigation had between the parties in Record No. 41 and the decree therein entered by the Circuit Court, and specifically affirmed by the Supreme Court of the United States, is **res adjudicata** of the issues involved in this cause.*

SYNOPSIS OF THE APPLICABLE PRINCIPLES OF RES ADJUDICATA.

Before entering upon the argument on this proposition, it may be of service to summarize the principles depended upon.

Cases applicable will be discussed later in detail. (See pages 36-59 *below*.)

Synopsis of Principles of *res adjudicata* presently applicable, drawn exclusively from the Federal jurisprudence as outlined in Vol. 10, "*Encyclopedia of U. S. Supreme Court Reports*," pages 729 to 798, under the heading "*Res Adjudicata*."

It will be recalled that the text of this work purports to be in the very language used in the opinion of this Court.

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties on a different claim or demand."

Id., p. 757, and cases in note 17.

(A)

"WHERE SECOND ACTION ON SAME CLAIM OR DEMAND." (Id., p. 757.) Or, where the "Defense" is the same. (Id., p. 761, notes 32 and 33.)

"GENERAL RULE—a. . . Rule Stated.—It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of *res adjudicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Such plea

applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in the former suit, and might have been presented in it. The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded."

Id., pages 757 to 759, and cases in notes 18 to 21.

"So, also, the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of defendant."

Id., p. 760, notes 26, 27.

"It is a well-established principle that a party seeking to enforce a claim, legal or equitable, must present to the Court, either by the pleadings or the proofs, or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute by piecemeal."

Id., p. 760, note 28, and cases cited.

"A party may *not* split up defenses."

Id., p. 761, and case cited in note 33.

"The judgment in a former action for the same cause is conclusive not only as to the defenses which were presented in such action, but also as to all defenses which might have been but were not presented."

Id., p. 761, and cases in note 32.

"When an action at law is brought upon a contract, the defendant denying its obligation, * * * must present his defense for consideration."

Id., p. 762, note 42.

(B)

"IDENTITY OF SUBJECT MATTER.

"While identity of subject-matter would usually seem to be implied from identity of cause of action, yet it has been expressly held, in at least one case, that where the parties are the same the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title, and depends upon the same question."

Id., p. 738, note 28.

(C)

"WHERE SECOND ACTION ON DIFFERENT CLAIM OR DEMAND.

"Necessity That Precise Question Shall Have Been Determined.—a. *General Rule.*—When the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. It must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

Id., pages 763 to 767, and cases in notes 49 to 53.

"EXCEPTION TO ABOVE GENERAL RULE.

"Matters Necessarily Involved.—Though the general rule is as above stated, yet it has often been held that the judgment in a former suit is conclusive as to all matters which were necessarily involved in such suit, so that the decision of the Court could not have been rendered in that suit without determining it."

Id., pp. 767, 768, and notes 56 and 57.

"EXTENT AND LIMITATION OF DOCTRINE.

"a. Judgment an Estoppel as to All Material Issues Decided—(1) General Rule.—It is well established that a valid final judgment on the merits rendered in a former suit is conclusive in any other suit between the same parties or their privies, as to all material matters put in issue and determined in the former suit."

Id., pp. 768, 769, and note 58.

Even although claims or defenses be *not* the same, it is laid down that the above quoted principle

"has been applied to adjudications as to the construction and validity of contracts, etc."

Id., p. 769, note 59.

So, still, although the claims in the two actions be not the same,

"if a former *decree in equity* covered and concluded the matters in difference, regarding the defense set up in a subsequent action, such decree must be treated as conclusive."

Id., p. 771, note 76.

(D)

A classification made in the text of *Id.* (Ency. of U. S. Sup. Court Reports) similar to that between causes of action in which the claims or demands or defenses are the same and those in which different, is that between the necessary "identity of causes of action, subject-matter and issues" * * * "where judgment or decree relied on as a bar" (*Id.*, p. 736), and "where judgment or decree relied on merely as estoppel." (*Id.*, p. 738.)

General Rule. * * * In order that a judgment or decree may operate as a bar to a subsequent action or suit, and conclude parties and privies not only as to any matter offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, there must be identity of the cause of action; the point of controversy must be the same in both cases."

Id., p. 736, note 23.

"PRESUMPTION.

"Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue."

Id., p. 737, note 24.

"TESTS AS TO IDENTITY.

"(a) *Sufficiency of Same Evidence to Sustain Both Actions.*—One criterion for trying whether the matters or cause of action be the same as in the former suit is that the same evidence will sustain both actions.

"(b) *Difference in Theory, Form or Measure of Relief Sought Immaterial.*—It would seem from the decisions that, in general, a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*.

"(c) *Identity of Relief Sought Not Sufficient Where Suits Rest Upon Different State of Facts.*—Where two suits, though seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to a recovery in the other." *Id.*, p. 737, notes 25 to 27.

The complainant in the two causes is the same, because the receiver of the Vicksburg waterworks is identical, as to right, with the company he represents. The defendant is the same. All that remains to be discussed is the question as to whether the issues now before the Court are the same in substance as those adjudged in the former case. *Or*, in the alternative, as indicated in the above "*Synopsis*" of the law either that there is identity of subject-matter although the claims, or *defenses*, be different; *or*, that the same question *including what was necessarily involved in it* (See p. 20 above) is asked to be passed upon now that was decided then, even if the claims or defences be different.

The issues in the former case were:

FIRST. Was the Bullock franchise valid?

The Court held that it was valid "*in all and every respect.*"

SECOND. Was the Bullock franchise exclusive, not only of third persons, but of the City of Vicksburg?

The Court held that it was exclusive ~~of both third persons and~~ of the City of Vicksburg.

THIRD. Did the City of Vicksburg have the right to erect a water plant of its own during the existence of the complainant's franchise?

The Court held that no such right existed, and enjoined the erection of such a plant during the existence of the franchise.

But the defendant contends that its right to erect such a plant during the existence of the franchise for the purpose of furnishing water in competition with complainant was alone in issue; that the purpose of said erection was the substance of the issue; and that, inasmuch as it now proposes to erect such plant during the existence of the franchise, not for the purpose of furnishing water during the existence of the franchise, but in order to have such plant ready to furnish water when the complainant's franchise shall have expired, its right so to do is not concluded by the decree in the previous litigation.

Any examination of the pleadings will show that the whole scope and validity of plaintiff's contract in regard to the erecting of a water plant during the life of the franchise was in issue.

(This is true, and sufficient, even if the third finding above stated) in the decree had not been based, as was the case (Infra pp. 10-13, and 56-57), upon a *wel'*

pleaded and specific issue of law whether the contract, properly interpreted, prohibited the City from building for any purpose whatsoever.)

The legislative act of March 9, 1900, attacked in the case, gave to the city power to issue bonds "to purchase or construct, equip and maintain a waterworks system." No time limit was fixed in this act. It was not mandatory upon the city to exercise the powers granted. It could use these powers just as well after the Bullock franchise had expired as before. No limitation was put on the purpose for which or the extent to which the city was to "construct, equip and maintain a waterworks system." The power granted could be used to construct, equip and maintain a waterworks system as well for the purpose of supplying water actively to the City of Vicksburg during the existence of the Bullock franchise, either in competition with that franchise or in supplement thereto, as for the purpose of having a plant ready to supply water after the Bullock franchise had expired.

That the power under the legislative act of March 9, 1900, could and might be used by the city without impairing the obligations of complainant's franchise was recognized both by this Court and by the final decree in case No. 41. In 185 U. S. 81 this Court said:

"As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build

and operate waterworks of its own in derogation of the contract rights of the complainant.

"Whether the act of the Legislature of Mississippi is, in its terms, subject to these objections, or whether it may be regarded *as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations*, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the Mayor was instructed to notify the waterworks company that the Mayor and Aldermen deny liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract, to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract."

In the final decree the city was enjoined (p. 47), not from issuing any bonds at all under the legislative act of March 9, 1900, but

"from issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed in said ordinance, contract and franchise."

The city at great length in her answer, as shown above, disclaimed that it intended doing, or that it had done, any act showing an intention "to construct, equip and maintain a waterworks system" until the validity of the Bullock

franchise had been determined, or that its acts complained of in the bill had been done under or because of said statute, and averred that it had only sought *to test the franchise*. (Rec., pp. 38, 39.) But note how the defendant now tries to shift its position in that case in a vain attempt to escape the plea of the thing adjudged. In its answer to the present case (Rec., pp. 12, 13) it says:

"Defendant avers that at the time the bill of complaint was filed in said cause by the Vicksburg Waterworks Company **it had denied all liability on a ccount of the franchise owned by said company,** and had announced its purpose to build a waterworks plant of its own to be immediately operated in competition with that of the Vicksburg Waterworks Company, and that the sole question presented by the pleadings in said cause was whether or not defendant had the right to compete **in this manner** with the Vicksburg Waterworks Company."

As shown above, this claim is incorrect, except as to the statement that it "*had denied all liability on account of the franchise.*" Having denied all liability on account of the franchise, and having set up in its pleadings in No. 41 that all of its acts were for the purpose of testing its liability under the franchise in respect to its right to erect a water plant during the existence of the Bullock franchise, its right to erect a water plant during the existence of the franchise for every object or purpose for which such a plant could be erected under the statute complained of, or under any other similar statute, was necessarily in issue, as the statute did not limit or define the purpose for which such plant was to be erected. That the parties and the Court so understood the issue is shown by the final decree (neces-

sarily submitted to and approved by the counsel for defendant), which enjoined the defendant "from issuing bonds under and by virtue of said act (of March 9, 1900), or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed in said ordinance and franchise" (Rec., p. 47); and, as if to make still more manifest what the Court meant, and to make the decree still more stringent and binding on this point, the decree proceeds to adjudge that

"the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in said ordinance, contract and franchise, dated 18th day of November, 1886."

Rec., p. 47.

That the defendant fully understood and appreciated what the scope of the decree was, and what it was intended to be, appears not only by its assignment of error No. VI, to the effect that "the said Court erred in perpetuating by its final decree the injunction against respondent, restraining it from erecting a waterworks plant of its own," but also by the written argument made and filed in that case in the Supreme Court of the United States.

We quote from the brief of the City of Vicksburg in this court in the case reported in 202 U. S. 453:

"This sweeping injunction restrains the city from building waterworks *for any purpose* until the termination of the Bullock franchise, and from taking any action whatever under the law of March 9, 1900, with that end in view. This is necessarily a holding that the said act of March 9th, in so far as it authorized the city to build a waterworks plant, is unconstitutional as impairing the obligation of com-

plainant's contract. The sixth assignment of error brings the question before the Court as fully and as completely as possible. The allegation in complainant's bill that the statute was in contravention of the Constitution of the United States, and the denial of that by the defendant, and the decree by the lower Court sustaining the contention of complainant, fulfill all the conditions of the statute. The question was not decided on the first appeal because the opinion, by express terms, so declares. It remains, therefore, to be shown that it is a material issue in the case. As to which we contend that undoubtedly the city had the right under the Bullock contract to build a waterworks plant, as provided in the act of March 9, 1900, for the purpose of flushing sewers, even though it should be held by this Court that the Bullock franchise and contract in its entirety were valid and binding on the city. We think it is equally true, as a matter of law, that the city had a right to build and operate waterworks to supply itself with water for such fire hydrants as it might need in addition to the ninety called for in the Bullock contract, and to supply its public buildings and institutions and its public fountains as they might be increased in numbers. There is no provision in that contract or ordinance which requires the city to take or pay for water from Bullock & Company, except the stipulation for the rental of ninety fire hydrants. In the absence of such agreement, the city certainly had the right to supply itself and to build a plant for that purpose. If the city is to be denied such right under the Bullock contract, it is by implication, and implication alone, which this Court has repeatedly held would not be permitted. (Authorities.) In view of these authorities, can it be said that the city was by the Bullock contract precluded from building waterworks to supply itself with water for purposes other than those stated in that contract, and in addi-

tion to the water there stipulated for? If not, the city had a right to build a plant for such supply."

See Printed Brief of Appellants "On Motion to Dismiss and Affirm and on the Merits," pp. 32, 33, 34, filed in No. 133 of the October, 1905, term of the this Court, being the case reported in 202 U. S. 453.

The scope of the final decree put in issue by the assignment No. VI, and the argument of counsel, oral and written, was evidently fully in the mind of this Court when it decided the case on the merits in 202 U. S. 453. The Court twice decided that the case as made by the pleadings was one making a case for an injunction in a court of equity in the exercise of that valuable feature of its jurisdiction to prevent anticipated and threatened action (185 U. S., p. 82; 202 U. S., pp. 459-460), and that there was not presented by the issues the mere case of a breach of a private contract, but that they disclose an attempt, by subsequent legislation of the city, to deprive the complainants of the rights under an existing contract (*Ibi.*).

In the decision on the merits in 202 U. S., the Court said:

"The decree in the court below was in favor of the Waterworks Company, maintaining its right to the contract for hydrant rentals *and enjoining the city, during the period of the contract, from constructing a waterworks system of its own, and requiring the city to construct a sewer for the disposal of house sewage from the city.*

"The assignments of error necessary to be considered are:

"1. * * * * *

..2. In enforcing the contract with the city in favor of complainant and *restraining the city from erecting waterworks of its own during the term covered by the contract with the complainant.*

"3. * * * * *

"We shall proceed to notice these in the order named.

* * * * *

"The principal controversy in the case is as to the correctness of the decree of the Court below restraining the city from erecting waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded herself from erecting or maintaining a system of waterworks of its own during that period (p. 462).

* * * * *

"Coming directly, then, to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect? (p. 465.)"

The Court then proceeded to decide that the city had the right to make a contract excluding herself, saying (p. 467) :

"And we think the question of the power of the city to exclude herself from competition is controlled in this court by the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1,"

The *Walla Walla* case is then discussed. In that case there was no exclusive grant, and the city charter prohibited

the making of an exclusive grant, but the City of Walla Walla had specially bound herself *not to erect* waterworks of its own, and reserved the right to take and condemn and pay for the company's works at any time after the expiration of the contract, "and this Court held that for the period mentioned in the contract, and as an incident to the protection of the rights of the contract, the city (p. 468) might exclude itself from competition. We think that case is decisive of the present one on this proposition. We shall proceed to consider whether the language of the contract is such as to prevent the city, during the period named therein from *erecting waterworks of its own.*"

* * * * *

(at p. 469) "In considering this contract we are to remember the well-established rule in this court, which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Waterworks Company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in *Knorrville Water Company vs. Knorrville*, 200 U. S. 22 decided at this term, citing previous cases.

"The contract in the respect under consideration is found in Section 1 of the ordinance, and undertakes to give to Bullock & Company, their associates, successors and assigns, the exclusive right and privilege, for the period of thirty years, from the

time the ordinance takes effect, of erecting, maintaining and operating a system of waterworks, with certain privileges named, for the furnishing of a supply of good water to the City of Vicksburg and its inhabitants, for public and private use.

"Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit to the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the

right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned. (at p. 470.)

"The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean 'Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction.' We think, therefore, it requires no resort to implication or intentment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the *Walla Walla case*, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that for the term named the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the con-

tract to destroy its benefit to the other. We think the Court below did not err in reaching this conclusion." (at pp. 470-471.)

* * * * *

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

Thus the broad decree of the lower Court "enforcing the contract rights of the complainant, and enjoining the city from **erecting** its own works during the term of the contract" without any restriction or limitation as to the purpose for which said works were during that period to be erected, the breadth of which decree was distinctly complained of in a special assignment of errors, *was distinctly and specifically affirmed.*

It is true that, in giving its reasons for this affirmance, the Court discussed only the most injurious and destructive purpose for which said works could be constructed during the existence of the franchise—*i. e.*, the construction of such works for the purpose of entering immediately and during the franchise into the business of furnishing water for public and private purposes; but having found that, without resorting to implication, or inserting anything by way of intendment into the contract, it gave the "exclusive right to erect, maintain and operate waterworks for a definite term (p. 470), that it is difficult to conceive of words more apt to express the purpose that the company shall have *the undivided occupancy of the field*, so far as the other contracting party is concerned (p. 470), and that the city has provided and the company has accepted a grant which says in plain and apt words *that it shall have an exclusive right,*

a sole and undivided privilege (p. 471), it was impossible for the Court to have entered this decree of affirmance without intending to cover thereby every other purpose or purposes for which said works might be constructed which would be in contravention of the complainant's right of "*undivided occupancy of the field*" less injurious in their effects than active competition in supplying water to private consumers. Suppose the defendant had passed an ordinance to erect waterworks for the sole purposes of supplying water to its own sewers, which it was not entitled to take free from the owner of the Bullock franchise, and was under no contract to purchase from that owner, of supplying water for additional hydrants, which it was not obligated to rent under the Bullock franchise, and of supplying water to new and additional public institutions which were not entitled to free water under the Bullock franchise, and which the city was not obligated to buy from the owner thereof? Would the defendant have the standing in court now to say that this right, urged by them in their complaint in this court against the breadth of the decree rendered against them below in the litigation which they provoked to test their liability under the complainant's franchise was not foreclosed by the decree of the Supreme Court, because, forsooth, that Court had referred *arguendo* only to the construction of waterworks to be used during the franchise in active competition in selling water? We submit that defendant would not be listened to urging such a defense.

We submit moreover, that the defendant is precluded by the settled rules of law founded on a salutary public policy from now setting up a defense against this decree that it was open to it to urge and that it might have urged under its assignment of errors in this court and that it might have

urged in the lower court before the decree was rendered—*i. e.*, the defense that it had the right to erect waterworks during the existence of the Bullock franchise in order to get ready to supply itself with water when the Bullock franchise had expired, and that so to do would not violate the exclusive Bullock franchise. This defense was indicated to it by the *El Paso case*, reported in 152 U. S., p. 152, a case which was decided by this Court five years before the bill in No. 41 was filed, and on which the defendant now so strenuously relies.

Having provoked a suit which put the whole scope and validity of the complainant's exclusive franchise in issue, it was its duty to set up in defense of its challenge of the validity and binding effect of that franchise every claim it could urge in defense of its right to erect waterworks in the City of Vicksburg during the period of the franchise. It could not set up some of these defenses and then either purposely or by inadvertence or by mistake reserve or omit other defenses, and urge such defenses in another suit on the same cause of action.

**FURTHER DISCUSSION OF AUTHORITIES
UPON THE PROPOSITION THAT THE
JUDGMENT IN THE FORMER SUIT
(NO. 41) IS RES ADJUDICATA.**

(a)

**Legal Effect of Pleading the Bullock Contract
and Franchise in full in the Bill in the
Former Suit.**

Pleaded in full as Exhibit B in No. 41, the *former suit*, at *Rec.*, p. 107; copy at *Rec.*, pp. 98 to 105.

Pleaded in full as Exhibit A in *present* suit, No. 119, at top of p. 50 of *Rec.*; copy at *Rec.*, p. 98 to p. 105.

The effect of making the franchise a part of the bill of complaint by way of an exhibit was to set up and plead every right accruing to the water company under the franchise which had been or was threatened to be transgressed by appellant in building new works.

In support of this proposition we cite the case of *American Bell Tel. Co. et al. vs. Southern Tel. Co. et al.*, 34 Fed. Rep. 803, in which the Court said:

"So far as respects the other matter—the special demurrer to the bill—the bill alleges that the complainant has a patent, giving number and date, and, in a general way, that it is one for the process of telephonic transmission of words, and makes profert of the patent. The weight of authority is that the profert of any recorded instrument is equivalent to annexing a copy (*Bogart vs. Hinds*, 25 Fed. Rep. 484, and cases cited; *Post vs. Hardware Co.*, 26 Fed. Rep. 618); and if a party avers that he holds title to any thing by a certain instrument, which he annexes, and that instrument both grants the title and describes the full extent of the rights conferred—and the patent does that—it is a grant from the government, and it describes exactly and specifically what is granted—it is equivalent to an averment that he has title to all the rights specifically described in such instrument. It would not be assisted or strengthened by separate averments that he held a right to this claim and that claim, enumerating them specifically. He avers that he has title to all when he says that he has a patent which contains all."

The following authorities and cases support the opinion above:

3 Ency. P. & P., pp. 362, 363.

8 Ency. P. & P., p. 740.

Electrolibration Co. vs. Jackson, 52 Fed. Rep. 773.

Samuel Cupples Envelope Co. vs. Lackner, 99 N. Y. App. Div. 231 (90 N. Y. Sup. 954).

Miller vs. Wayne International Bldg. Assn., 32 Ind. App. 480 (70 N. E. 180).

This seems to us to be entirely *inconsistent with any of the authorities cited* by counsel for the city, or with any we have been able to find. Certainly it does not comport with the language in the opinion in the case of *American Bell Tel. Co. vs. Southern Tel. Co.*, 34 Fed. Rep. 803, *quoted above*, in which the Court declared that the complainant's having made the patent upon which he predicated his rights an exhibit to his bill of complaint was "equivalent to an averment that he has title to all the rights specifically described in such instrument."

If appellant's contention were correct, the city might bring as many suits as it saw fit to set aside and annul the franchise. It could test in separate suits every conceivable aspect of the contract.

(b)

Upon the point that a party cannot split up his cause of action for part of an indivisible demand, we quote from *Texas vs. White et al.*, 22 Wall. 157 (22 L. Ed. 819), as follows:

"It would be to trifle with the Court to make a proceeding in equity, designed to give relief and to

administer complete justice, to depend upon the skill and jugglery by which a defendant might conceal some part of his defense to that suit until it was decided against him, and then set up as an excuse for disobeying the final decree of the Court, or hold it out as the basis of another suit for the title or possession of the same bonds. And whatever difference of opinion may be found in the authorities on the nice distinctions involved in the question of what is concluded in suits at law, and without even the necessity of going so far as this Court has gone in actions at law in holding that all that might have been set up as a defense in the action must be concluded by the judgment, we are of the opinion that, in such a case as this, in a suit in equity, when the obvious purpose of the bill to establish and adjudicate the entire rights and title of the parties before the Court, * * * the decree must be final and conclusive on all the rights of all the parties actually before the Court."

That the *same rule is applicable* to an attempt to *split up a defense*, see *Beloit vs. Martin*, 7 Wall. 619.

The case of *Dimock vs. Revere Copper Co.*, 117 U. S. 559 (29 L. Ed. 994), is also in point.

In this case Dimock, the defendant below, failed to plead a discharge in bankruptcy in a suit brought against him by the Revere Copper Company, and let judgment go by default. Afterwards the Revere Copper Company brought suit on the default judgment, and Dimock this time pleaded his discharge in bankruptcy. The lower Court held this *res adjudicata* against Dimock, and gave judgment against him on the former judgment.

Justice Miller, who rendered the opinion of the Court, said:

"It is said, however, that, though the defendant had his discharge before the judgment in the State court was rendered, and might have successfully pleaded it in bar of that action, and did not do so, the judgment now sued on is the same debt, and was one of the debts from which, by the terms of the bankruptcy law, he was discharged under the order of the bankruptcy Court; and to make any attempt to enforce that judgment the discharge may still be shown as a valid defense. That is to say, that the failure of the defendant to plead it when it was properly pleadable, when, if he ever intended to rely on it as a defense, he was bound to set it up, works him no prejudice, because, though he has a dozen judgments rendered against him for this debt after he has received his discharge, he may at any time set it up as a defense when these judgments are sought to be enforced. Upon the same principle, if he had appeared in the State court and pleaded his discharge in bar, and it had been overruled as a sufficient bar, he could, nevertheless, in this action on that judgment, renew the defense.

* * * * *

"We are of the opinion that, having in his hands a good defense at the time judgment was rendered against him—namely, the order of the discharge—and having failed to present it to a Court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that defense cannot be set up here in an action on that judgment."

In *Southern Pacific Railroad Company vs. United States*, 168 U. S. 1 (42 L. Ed. 355), a case very similar to that at bar, the Court said:

"It is said, however, that, under the pleadings and evidence in this collateral proceeding, it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872, filed by the Atlantic and Pacific Railroad Company, and to show that they were not maps of definite location."

"Is this position consistent with the settled rule of the law as to the conclusiveness, between parties and their privies, of the final determination by a Court of competent jurisdiction of matters put in issue by the pleadings?"

* * * * *

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusive-

ness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

To the same effect, see:

City of Aurora vs. West, 7 Wall. 82 (19 L. Ed. 42).

Tioga Railroad Co. vs. Blossburg and Corning Railroad Company, 20 Wall. 137 (22 L. Ed. 331).

Cromwell vs. County of Sac., 94 U. S. 351 (21 L. Ed. 195) under the aspect quoted and applied in *Fayerweather vs. Ritch*, 195 U. S. 276.

(c)

Under the rule laid down in the foregoing cases, it was the duty of appellant in *Suit 41* to plead its right to build non-competing works, if it ever desired to make such contention; and, having failed to do so, it is now estopped.

In other words, the foregoing cases are applicable, *even if one claim be incorrect*, which we have pointed out to be true that the question upon which we claim the conclusiveness of the thing adjudged, a *particular interpretation* demanded in our bills in No. 41 of the contract and franchise therein pleaded in full, is a *question of law* and that it was distinctly put in issue by the demurrer pleaded in the answer in No. 41, and separately put in issue by the general and specific denials therein.

(d)

Authorities illustrating the distinction between error in construction of document, to be corrected *only* upon appeal, and not collaterally, and lack of jurisdiction, which alone subjects judgment to collateral attack.

Hine vs. Morse, 218 U. S. 493.

Fayerweather vs. Ritch, 195 U. S. 276.

The *latter* case indicates the extent to which an appellate Court should go to support jurisdiction claimed lacking.

There the question upon which absence of jurisdiction was claimed was that the State Court had failed to pass upon a material issue raised by the pleadings, and upon which the findings and decree were silent and the trial Justice testified that he had not considered.

This Court held that these facts sufficiently supported the claim in the Federal Circuit Court to protection against a State judgment under the Fifth Amendment to clothe the Court with jurisdiction to inquire whether the judgment was void on that score.

But then, after taking jurisdiction, and making judicial inquiry into the record of the State Court judgment, this Court held that the failure to pass upon the issues in the trial court was cured by the proceedings on appeal, from which it was *fairly inferable* that the appellate Court had had brought to its attention and passed upon the issue upon which the trial Court had neglected to pass. One of the sources of such inference was that the attention of the highest State appellate court had been sufficiently drawn to the neglect in a *motion to amend its remittitur*.

Hine vs. Morse (above).

After all, it seems that *appellant's whole contention is nothing more than a play on words* as to their proper meaning and signification. The whole controversy is based upon the meaning of "exclusive right to erect waterworks." What do these words mean? In Suit 41 the Court construed them to give Bullock & Company the "sole and undivided right" to the use of the streets for the purpose of building waterworks. Appellant now claims that the words ought not to be given so broad a meaning; that they do not, properly construed, include the building of non-competing waterworks.

The only question open for consideration now is whether or not the Court in Suit 41 had jurisdiction to construe these words. If it did, the question is closed; otherwise, a controversy of this kind would never be ended.

In *Hine vs. Morse* (above) this Court said:

"The Supreme Court of the District had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceedings, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If, then, jurisdiction consists in the power to hear and determine, as has so many times been said, the Court errs in holding that a case has been made, either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction, and that its decrees are absolute nullities? To this we cannot consent. If the Court was one of general and special jurisdiction, if, under its inherent power, supplemented by statutory enlargement, it had jurisdiction, under any circumstances, to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particu-

lar application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.

* * * * *

"Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects, it is as conclusive as if it were irreversible in a proceeding for error."

Further Authority That Mistake of Law Is Mere Error.

In *American Express Company vs. Mullens*, 212 U. S. 311 (53 L. Ed. 525), Justice Brewer, speaking for the Court, said:

"A judgment is conclusive as to *all the media concludendi*, * * * and it needs no authority to show that it cannot be impeached, either in or out of the State, by showing that it was based upon a *mistake of law*."

The foregoing authorities make it clear that the only question open for discussion is that of jurisdiction. If the pleadings sufficiently put the franchise before the Court to give it jurisdiction to pass on the validity of the contract, and to interpret its meaning, then, as requested in effect by both sides, that interpretation must stand, however erroneous. If erroneous, it was the duty of appellant to assign the error on the appeal in that case; and having failed to do so it may not now take advantage of it. We have shown

that, *in fact*, appellant did point out what it now can claim, we submit, only as error of this Court (202 U. S. 453) and the lower Court in No. 41.

(e)

Distinguishing Cases Cited for the City.

The cases cited by appellant seem to us to have but little bearing upon the case at bar. They are to the effect that a former judgment does not estop a subsequent suit as to *subject-matter* not before the Court in the suit in which the judgment was rendered. A careful reading of the cases will show that in each instance where it was held there was no estoppel the subject-matter was not in any sense before the Court so as to give it jurisdiction to render the decree complained of. It is always a question of jurisdiction. If the Court has jurisdiction to render the decree, the estoppel is all to the effect that on direct appeal the Court will look into the question as to whether the relief granted exceeds that which ought to have been granted under the pleadings, or is in any way different from that which ought to have been granted; and that, if any error be found, it will be corrected. They have no bearing on the case at bar, because Suit 41 is not on direct appeal, but is here set up collaterally by way of estoppel. The right to consider mere error in that decree died with the direct appeal. The decree can now be attacked only on the ground of fraud or upon the ground that it is absolutely void.

The cases cited by appellant can, therefore, have no application.

Counsel for appellant apparently *overlook the fact* that appellant's attack on the decree in Suit 41 is *collateral*, and

that nothing can now be considered except the jurisdiction to render it. If there was jurisdiction, *it may be ever so erroneous*, yet it must stand as rendered.

See *Case vs. Beauregard*, 101 U. S. at page 692, where this Court said:

"Thus it appears the bill exhibited all that was necessary to give to the Court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court, and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants. It would be idle, therefore to reconsider the question whether the bank has a lien upon the property he seeks to charge, or whether there had been a trust in the bank's favor."

Appellant had a *right to file a suggestion of error* in Suit 41 and therein set up the contention it now makes; but, having failed to do so, the decree is *not* now open to attack, unless as suggested above.

It filed a general suggestion of error that the decree was too broad, and complained in its brief that under this decree it was prohibited from erecting waterworks during

the franchise for any purpose, and argued that it had the right to erect waterworks during the existence of the franchise for certain specific purposes, but failed to argue that it had the right to erect them for the purpose of being operated after the franchise had expired. It is too late now to ask the Court to amend its decree in this respect.

The case of **Reynolds vs. Stockton**, 140 U. S. 254, *quoted at length in appellant's brief*, pp. 35-36, was a suit by the policy-holders of the Hope Mutual Life Insurance Company of New York and one of the stockholders of that company against the Superintendent of Insurance of the State of New York and the Hope Mutual Life Company, and the receiver of the New Jersey Mutual Life Company seeking to subject a deposit of \$100,000 made by the Hope Mutual Life Company with the Superintendent of Insurance of New York as a guarantee to the policy-holders of said Hope Mutual Life Company. The suit went to judgment holders *pro tanto*. This decree is described in the opinion as follows :

"A decree was entered, which decree confirmed the report of the referee, and made final disposition of the funds in the hands of the superintendent of the insurance department, in partial payment of the various claims presented. It also, in paragraph 8, contained this reservation.

" 'And it is further ordered that either party to this action or any person interested in the subject-matter thereof have liberty to apply for further directions on the foot of this decree, and the question of the inheritance of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott, and Messrs. Harris and Rudd, reported by Referee Samuel Prentiss, be reserved.' "

Afterwards, without notice to any of the parties, judgment was entered against the defendants in favor of the plaintiffs for one million and odd dollars. Suit was brought on this judgment in the Chancery Court of New Jersey, which Court declined to recognize the judgment as an adjudication against the receiver of the New Jersey Insurance Company, or as a liability against the assets of said company in his home. This decision was on appeal affirmed by the Supreme Court of New Jersey, whereupon a writ of error was prosecuted to the Supreme Court of the United States, which Court said:

"The section of the Federal Constitution which is invoked by plaintiffs is Section 1 of Article IV * * * provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' * * * It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the Courts of another State as valid, or that a judgment rendered by a Court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State."

From the foregoing it is apparent that the *Reynolds case* was not a suit for a personal judgment, but was merely

a proceeding to subject the funds in the hands of the insurance commissioner to the payment of certain debts.

After it had proceeded to a final decree under the pleadings and presumably was at an end, a further decree was rendered without notice giving the complainants a personal decree against defendants. The Court treated this extreme case as close and argued it at great length before reaching the conclusion that there was no jurisdiction to render the last decree.

The object sought in Suit 41 was the annulment of the Bullock franchise, and the decree instead of annulling the same established it, and having done so enjoined the appellant specifically from building waterworks during its life. It seems to us that it cannot be said that there was want of jurisdiction either as to the parties, or as to the subject-matter of the decree. Certainly the *Reynolds* case is not in point and affords *no* precedent.

The cases cited on pages 44, 45 and 46 of appellant's brief and the case of *Conway vs. Taylor's Executor*, on pages 62, 63 and 64, are all to the effect that on direct appeal the Court will look into the question as to whether the relief granted exceeds that which ought to have been granted under the pleadings, or is in any way different from that which ought to have been granted, and that, if any error be found, it will be corrected. They have no bearing on the case at bar, because Suit 41 is not on direct appeal, but is here set up collaterally by way of estoppel. The right to consider mere error in that decree died with the direct appeal. The decree can now be attacked only on the ground of fraud or upon the ground that it is absolutely void.

**APPELLANT'S TREATMENT OF THIS
COURT'S OPINION IN THE FORMER
SUIT BETWEEN THESE PARTIES (202
U. S. 453).**

We have replied at length to the *Reynolds vs. Stockton case*, because it is apparent from appellant's brief that they have relied upon the same. *The other cases seem to have clearly as little bearing as that*, but we shall not take the time of the Court to review them.

Rather, we take a little more space to reiterate that there can be no better test as to what was before the Court in *Suit 41* than the language of the *opinion rendered in that case*. In describing the issues raised and presented for adjudication, Justice Day, who rendered the opinion, said:

"The principal controversy in the case is as to the correctness of the decree of the Court below restraining the city from erecting waterworks of its own within the period named in the contract (Bullock franchise), which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of waterworks of its own during that period."

It will be noticed that the brief of appellant does *not* quote or refer to *that part of the opinion* above set out, which seems to us to be the very essence of the opinion on the question now under investigation. It is hardly conceivable that Justice Day was not sufficiently familiar with the pleadings to correctly state the issues raised, but either

he was not or counsel for appellant are wrong. Their contention is that the very issue which he states as "principal controversy" was not raised by the pleadings at all.

APPELLANT'S TREATMENT OF THE OPINION IN
THE SUIT BETWEEN THESE PARTIES IN
206 U. S. 496.

Counsel for appellant further contend that this Court, in rendering the opinion in the suit of **City of Vicksburg vs. Vicksburg Waterworks Company**, 206 U. S. 496, construed the opinion rendered by it in Suit 41 so as to limit the injunction in Suit 41 to the establishment of competing waterworks, leaving appellant free to build non-competing works. We do not consider that the opinion in the last case has any such effect. It was contended in the latter case that the decree in Suit 41 precluded the city *from regulating the water rates* then in force. A casual review by the Court of the opinion in 41 disclosed that the rate question was not before the Court in 41. What the Court actually said on this point was:

"While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S. 65 while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Waterworks Company, under the contract to carry on its business without the competi-

tion of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit that the Vicksburg Waterworks Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to the Constitution of 1890, was not controlled by its provisions. The right to recover for rentals was also directly involved, as the city had denied its liability therefor, and an accounting was prayed in the original bill and the decree specifically disposed of that issue. It is true that in the answer it was averred that the alleged contract imposed upon the inhabitants of Vicksburg an onerous and extortionate burden; 'that no such contract would now be made with the Vicksburg Waterworks Company or any other company; that the rates authorized in said ordinance far exceeded the rates charged in other cities under like circumstances and in general terms,' the city denied that it was bound to the complainant by contract; 'that for the many reasons therein set forth no liability existed on the part of the city by reason of the contract.'

"An examination of the record in the former case shows that the only testimony taken in the case, as to the reasonableness of the rates charged to private consumers, was on behalf of the company, and tended to show that the rates charged were reasonable, and if it could be said that the pleadings put in issue the reasonableness of the rates then charged, *was the right of the city to regulate rates under a subsequent law of the State necessarily involved and concluded?* The determination of issues as to the right of injunction against the city building its own works, or denying liability or refusing to pay the rentals contracted for, and a finding that existing rates were reasonable, *did not necessarily conclude*

a controversy which might thereafter arise as to the right of the city to fix rates when the Legislature of Mississippi should pass a law for that purpose, giving the city the right to regulate the same. It is to be remembered that when the bill was filed in the original case no such law had been passed; that when the act of March, 1904, went into effect the case was nearly ready for final decree, and the city passed its ordinances long after the beginning of the suit, and shortly before that decree. No supplemental bill was filed, but after the decree, in January, 1905, the present independent suit was brought with a view to enjoining the proposed action of the city in enforcing ordinances regulating the rates by charges other than those contained in the contract.

"Upon the appeal, the question seems to have been argued by the city as though made in the case, though the brief on behalf of the appellee contends that the act of 1904 was not involved. But a decree must be read in the light of the issues involved in the pleadings and the relief sought, and we are of opinion that the matters now litigated were not involved in or disposed of in the former case, and that when properly construed the decree does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect and long after the bill was filed in the case."

This was all that was necessary for the Court to determine in reference to Suit 41, and it was all that was actually determined by the Court. The fact that competition was involved in 41 was noted by the Court in this investigation, and attention was called to it; but, not being a matter necessary to be determined by the Court, it cannot be treated as a judicial construction of the former opinions beyond the point necessary to be determined. Besides the quotation from the opinion in the 206 case set out in

appellant's brief on pages 61 and 62, the Court further *expressly says*:

"The determination of issues as to the right of injunction against the city *building its own works* * * * did not necessarily conclude a controversy * * * as to the right of the city to fix rates." (Our italics.)

This quotation has no reference to competition, and we think it manifest therefrom that the Court was *not* undertaking to define its former decree *so as to limit it* to competition merely.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, this Court referred again and again to the ruinous effects of city competition, yet the actual decree *made no mention of competition*, but merely enjoined the City of Walla Walla from building new waterworks during the life of the franchise in question. This, of course, was on the theory that there could be no competition if the city was precluded from building its own waterworks. The injunction against building put an end to the question of competition. It was the greater relief, and included the lesser, so as to make it unnecessary to decree on the lesser. The city in the *Walla Walla* case contracted *not* to build during the life of the franchise, while in the *Vicksburg* case the city contracted to give Bullock & Company *the exclusive right to build*, which *necessarily* excluded the city from building. The right given to Bullock & Company *could not be exclusive* if the city reserved to itself any part of that *right.*

(f)

The argument for the City, made by the City's counsel at great length in their brief, that the prayer of the bill in the former suit (No. 41) was insufficient in law to support the decree for relief because the prayer for an interpretation prohibiting the City from building for any purpose (Rec., p. 26) had not been alleged as a conclusion of law in the body of the Bills.

There are *two* separate and distinct answers to this one of the city's contentions:

FIRST. The one in several places elsewhere suggested that the allegations in the body of a bill of *conclusions of law*, such as the claimed interpretation of a particular contract, are immaterial. *Good pleading does not call for the averment of conclusions of law*, although for purposes of clearness of narrative the pleader may deem it desirable to here and there prevent gaps in the sequence of his statement by inserting them. The pleading of the contract and franchise in full, in other words, was sufficient to comply with the rule which Appellant's counsel invoke; even if no allegation at all had been contained in the body of the Bills relative to the respect in which interpretation was desired. We should also be prepared to contend, *if necessary*, that any question as to the legal effect of this contract and franchises, pleaded at length, as in the two Bills in No. 41, could be

properly raised by complainant under a prayer for general relief. But it is not necessary; since the prayer for relief in our amended and supplemental bill in No. 41 not only *specifically* asked for an injunction against the City's building irrespective of competition; but misinterpretation of that prayer was rendered impossible because of the separate specific prayer for an injunction against the City's building for purpose of competition.

See *Rec.*, pp. 26, 44, 29 and 38-39 and quotations therefrom and discussions thereof. *Infra*, 10-13, 23-24)

The *demurrer* (*Rec.*, p. 44) in the answer (The answer was in terms made to both original and supplemental and amended bill, *Rec.*, p. 27), illustrates the above. It is elementary that it admitted no conclusions of law in the bills.

Hence, it admitted no allegations either in the body of the bills, or in the prayers, as to the legal effect of the contracts and franchises pleaded in full in the two bills.

Second. If the admission in the answer (*Record*, page 29, made clearer by *Rec.*, pp. 38-39) was effective to subtract anything from the effect of the generality of the demurrer (*Rec.*, p. 44) it served but to make the more pointed the issues of law raised by the demurrer. It did so by notifying the company that it would not contest: *first*, the specific issue of law as to the exclusiveness of the right granted the Company to build and maintain free from infringement by the City for any purpose (See *Sup. and Am. Bill at Rec.* page 26.) so far as the exclusiveness of the right to maintain was concerned; and (second), that it would not contest the separate specific issue of law, as to the exclusiveness of the right granted the Company to build and maintain free from infringement by the City for purpose of competition

(See: *same Rec.* at p. 26) to the same extent, viz: so far as the exclusiveness of the right to maintain was concerned.

In other words, the admission made specific the issues of law raised by the demurrer by narrowing them: *1st*, to a denial that the Company had the contract right to enjoin the City from building for any purpose; *2nd*, to a denial that the Company had the contract right to enjoin the City from building for competitive purposes.

It is unnecessary to make further reply than the above to appellant's contention that the allegations are insufficient in law to support the prayer of our bills in 41, and the express findings in the decree.

But, to show the emptiness of the contention, we go further. We do so upon the assumption that appellant *still* be unwilling to concede that *good pleading* for the purpose of giving the constitutional notice required by the Fifth Amendment, or required by any other rule of law, does *not* necessitate the allegation in the body of the bill of an interpretation desired of a contract set forth at length in the bill; and, to the contrary, that the requirements of good pleading are satisfied by a general prayer for relief; and *a fortiori*, as in the bills in 41 in question, by a specific prayer for the particular interpretation desired. (*Rec.*, p. 26.)

The city's contention in this regard, however, seems necessarily based upon the further untenable assumption that an allegation of the legal effect of a contract pleaded in full is an allegation of fact, or conclusion of fact. Such an allegation undeniably is a conclusion of law.

We cheerfully admit that upon an issue of fact tendered a specific prayer cannot usually lay the predicate for greater relief than the *averment of fact* warrants. But the issues here of contract construction are issues of law. Even if they were issues of fact, we submit that a decree under a

prayer for general relief may extend beyond the averments of the bill (or of a special prayer.)

The only limitation upon the relief which then may be granted is that it must be predicated on the entire record before the Court. In this instance, upon the answer as well as the bill. A decree interpreting a bill was upheld by resorting to the answer for a part of the will not pleaded in the Bill of Complaint in *Cavender vs. Cavender*, 114 U. S. 464.

The relief granted may be erroneous because *not* sufficiently supported by the record, and, therefore, subject to reversal on direct appeal; but, for the purpose of collateral attack, the only requirement is that it shall conform to *due process of law*. (*Fayerweather vs. Ritch (above)*, 195 U. S. 276.) A decree *entirely foreign* to the issue of fact raised by the pleadings would be void, and could be attacked collaterally, because the Court would have no jurisdiction or power within jurisdiction (*Windsor vs. McVeigh*, 93 U. S. 274) to render it. Jurisdiction to try a cause is conferred necessarily by the pleadings, and, if the pleadings raise but one issue of fact, jurisdiction to try that issue arises, but not jurisdiction to try some other issue of fact.

If Suit 41 had not put in issue the validity and legal effect of the Bullock franchise, the Court would not have acquired jurisdiction to determine either its validity or meaning, and any decree as to either would have been void and subject to collateral attack; but, since the pleadings called for an adjudication of both the validity and the legal effect, it had jurisdiction to decree on both; and, having jurisdiction, its decrees, however erroneous, may not be inquired into or altered in this proceeding. All that is now open for interpretation is the meaning of the decree on its face.

II.

On the proposition that the original Bullock franchise excluded the defendant city from erecting and maintaining during the existence of the franchise a water system of its own, even one to be operated after the Bullock franchise had expired.

At the time this franchise was granted the City of Vicksburg had no waterworks, but had legislative authority by the Act of 1886 "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

Bullock & Co. agreed to "build and operate" a waterworks system for the city, under an *exclusive* franchise for thirty years. The terms of this exclusive franchise are stated above. It will be noted that while the city *reserved the right to buy*, and obligated the grantee to sell during the whole life of the franchise, *she did not obligate herself to buy*, or to indicate whether she would buy or not, except at certain periods, one of which expired contemporaneously with the franchise itself. It thus appears what a dangerous and precarious position the water company would be in at the termination of its franchise, if the city should not exercise her option to buy. The company would have an immense plant, which would have no value except as junk. It would have many miles of water pipes buried in the ground which would be good as water pipes for 100 years, but which it would not pay to dig up and sell as old pipe or as old iron.

Its right and power to use all this property for the purpose for which it was organized would pass out of existence on the day its franchise terminated.

It is manifest that the parties took all this matter into consideration when this contract was made. It was evidently contemplated by both parties that the city, if it did not elect to grant the owners of the waterworks a new franchise, *would buy* the property either during the franchise or at its termination, and machinery was provided whereby the price to be paid would be settled with perfect justice and equity to both parties. It is equally manifest that both parties knew that when this franchise expired the city was bound to have a waterworks system as a matter of public necessity either by renewing the franchise, purchasing this plant or by erecting another. But if the city could erect another during the existence of the granted franchise, all incentive to buy the existing plant would disappear. If it could not erect a new plant during the existence of the franchise, it would have a compelling incentive to buy the existing plant or renew the franchise, because it would be an intolerable situation for the city to be without a public or private water supply during the time necessary to erect a new plant. It is evidently for these reasons that the grantee, in lieu of the *obligation* to buy at the end of the franchise, usually inserted in contracts of that character, consented to invest the large capital required to erect these works and put it in the precarious position, because of the stringent character and language of the exclusive franchise, well knowing that if that franchise was enforced and protected according to its terms, and in the light of the situation of the parties, *the city would be compelled to exercise its option to buy*, if it decided not to renew the franchise. The city evidently looked at the matter in the same light, and agreed to this

stringent franchise, well knowing that its terms would compel her to buy the plant, or grant a new franchise, her citizens and officers not at that time conceiving that any community or any set of public officers could deliberately go to work wantonly to destroy the capital invested in these waterworks; because it would be a wanton destruction of capital for the City of Vicksburg to refuse to buy this plant which is ample and sufficient for all of her purposes, and thus reduce it to junk, and to spend the value of the plant in the erection of another plant for the same purpose.

Interpreting then this "*exclusive franchise*" in the light of the then situation of the parties and in the light of what the situation of the parties will be at the end of the thirty year franchise, every equity is with the owner of the franchise and a court of equity will go to the farthest limit to prevent the unnecessary destruction of property and the wiping of wealth out of existence.

It will be noted that the exclusive franchise is not merely one to supply water to the City of Vicksburg and her inhabitants for thirty years, but it is an exclusive franchise "of erecting, maintaining and operating a system of waterworks," and "*of using the streets, alleys, public squares and other public places * * * for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing * * * water to the City of Vicksburg, Miss., and to its inhabitants for public and private use, etc.*"

If an exclusive franchise means what this Court says it means, "*that the rights and privileges named and granted shall be **EXCLUSIVE***" (202 U. S., p. 470), "*that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned*" (*Ibi.*), "*that the city has provided and the company has accepted * * **"

a sole and undivided privilege" (*Ibi.*, p. 471), "that if the right is to be exclusive * * * it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone" (*Ibi.*, p. 470), then the city cannot during the franchise enter upon the streets, alleys and public squares and other public places of the city to lay down her pipes, mains and conduits and erect hydrants and other apparatus for waterworks purposes and thereby almost necessarily disturb remove and displace the similar apparatus of the exclusive grantee, and particularly the thousands of connections with the private service pipes, which run from the property line to the curb line where they meet the connections of the waterworks laid in the public places.

In reality, this question of contractual interpretation which appellant has exalted to the first place in its printed argument (*page 8*), besides being no longer open to discussion, because concluded by the judgment in the first case (*No. 41*) is immaterial, the language of the clause being plain, and consequently there being no room for judicial construction. It is no function of a court of equity to revise an unambiguous contract when, as here the parties are competent, duly authorized and deal at arm's length. Nevertheless, we submit, we have shown above that if the contract in respect to the exclusiveness of the right to build were so obscure as to warrant judicial construction, the balance of the equities would favor the literal, with which the spiritual and contextual meaning correspond, rather than what the appellant chooses to call the equitable meaning.

Upon this question of contractual interpretation, the *El Paso* and *Sioux Falls* cases are not authorities. No case

interpreting a detached clause in a contract is an authority in passing upon another contract that happens to contain the same or a similar clause, unless the remaining portions of both contracts are the same, or substantially the same.

Apparently, the circumstances of the presentation of those cases for decision, made it unnecessary in each of them for the Court to give sufficiently detailed consideration to the interpretation of the clauses in question to make it worth while to set out the other parts of the contracts in which they occurred. What were these circumstances?

It appears from the opinion in the *El Paso case* (152 U. S. 157) that the construction given was not in response to an issue in the cause and, therefore, was not argued by counsel. The legal conclusion stated the mere argument of the Court to show that the record did not disclose that the jurisdictional sum of \$5,000 was involved. It does not appear from the opinion that a different conclusion would have been reached by the Court if it had assumed that the exclusive franchise precluded the City of El Paso from building waterworks during the term of the franchise. This assumption would still not have necessarily shown the requisite jurisdictional sum. The fact was that the record before the Court made no declaration as to the amount involved, nor did it give any data from which the Court could logically reach the conclusion that the requisite jurisdictional amount was involved. In this state of the case, Justice Brewer, who rendered the opinion, undertook in a casual way to consider elements of damage which might result and, in arguing this out, he said:

"The time for which the exclusive right, as claimed, was given, was fifteen years, and the city would be guilty of no breach of any obligation if, during the life of the contract, it proceeded to sink

artesian wells, to establish waterworks, and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks, and had continued in its labors in that direction during the entire life of the contract; that would have been no breach of its obligations to the plaintiff."

This statement does not seem to us to convey the force and effect of a solemn opinion by the Court rendered upon issues raised by the pleadings and argued by counsel. On the contrary, it would seem to be nothing more than mere *obiter dictum*; even if the other clauses of the contract undisclosed by the opinion were substantially the same as those in the contract in this case.

We know that the Court in the *Walla Walla case*, which followed it by a few years, reached the conclusion that a city might preclude itself from building during the life of a franchise and that Walla Walla had done so by express terms.

In the case of the *City of Vicksburg vs. Vicksburg Waterworks Company*, 202 U. S. 453, while the franchise now in question was being considered by this Court, Justice Day, speaking for the Court, said (at p. 468) :

"In the *Walla Walla case* the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this Court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, the city might exclude itself from competition. We think that case is decisive of the present one on this proposition."

Having in mind the consideration before adverted upon, that both the *Walla Walla* case and the *Vicksburg* case were decided long after the *El Paso* case, it seems to us that the quotation last above, apart from the question of *res adjudicata*, is decisive of the right of the city to exclude itself and of the fact of its having done so.

An examination of the *El Paso* case shows that the city in granting the waterworks franchise did not reserve the right to buy as in the *Vicksburg* case, nor any right to condemn as in the *Walla Walla* case, and therefore at the end of the franchise she would be absolutely helpless if she could not prepare herself to meet this contingency. This consideration evidently had its weight with the Court in reaching the result set forth in its *obiter dictum* relied on by defendant.

Counsel for appellant also refer to the case of *Sioux Falls vs. Farmers' Loan and Trust Company* as supporting their view of the Bullock franchise. In reference to which they say on page 24 of their brief:

"Counsel for appellee seek to distinguish this case on the ground that the franchise had expired shortly before the Circuit Court of Appeals delivered its opinion. No allusion whatever was made to this fact in the opinion, and it is doubtful if the Court even observed it. Counsel acquired their information only by comparing the date of the expiration of the franchise with that of the delivery of the opinion."

The opinion of the Circuit Court of Appeals expressly states as follows:

"The only contract between the city and the water company expired before the decision of the Circuit Court."

This quotation is taken from the body of the opinion and will be found on page 383 of Vol. 69 of the C. C. A. Reporter. It conclusively demonstrates that the Circuit Court of Appeals did take notice of the fact that the opinion of the Circuit Court was rendered after the franchise had terminated. By reference to the decision in the Circuit Court it will be found that the case was decided July 11, 1904, following the expiration of the franchise in April preceding. Of course, it was right and proper that the injunction should be dissolved, as the franchise upon which it was granted had in the meantime expired. For this reason the case is not in point and has no bearing.

Reference by counsel to the case of *Denver vs. Denver Waterworks Company*, recently decided by this Court, seems to us to have no application whatever. The Court there held that the language employed did nothing more than give the city an option to buy the works without an obligation to do so. We have never argued that any greater effect ought to be given to that provision in the Bullock franchise; and, since we contend for nothing more, it can have no bearing on the case. The rights and obligations we claim to arise under the franchise in favor of the water company and against the city are predicated on the exclusive right "to erect" waterworks, and the only bearing of the option is to show that the city reserved the right to buy in the eminently fair manner agreed on as consideration for its surrender of the right to erect.

Possibly it is because of the immateriality, or relative immateriality, of the construction of the clauses in question to the determination of the main issues in the *El Paso* and *Sionx Falls* cases (above) that the opinions fail to point out definitely whether consideration of the undisclosed matter

in these contracts outside of the clauses construed was ignored in arriving at the conclusions expressed. We insist that there is warrant for the inference that the ground of the construction must have rested upon a broader basis than what is disclosed in the opinions. For we submit that a *literal and grammatical interpretation* of the language of the clause in the present contract, considered in and by itself, would seem to afford no reason for assigning to the group of exclusive rights granted in the clause a bifurcation such as the city claims, and, indeed, no reason exists for doubting what was the precise meaning intended by the parties in using the phraseology adopted in the clause. The claim of construction made by the city in its pleadings in the case, the judgment in which is a bar to this case No. 41 (culminating in 202 U. S.), was that the waterworks company had no exclusive right to erect, although it was admitted that, if there was any liability at all under the contract, there was an exclusive right to maintain.

Rec., p. 29, third line from top, in conjunction with the last paragraph of p. 44, and the last eight lines on p. 38, and first seven lines from top of p. 39.

To justify denying the exclusiveness of the right to erect that in the same clause in plain terms extends also to the right to operate, counsel for the city suggests that the parties attached no importance to the exclusiveness of the right to erect; that it was slipped into the clause undesignedly through the negligence of counsel who drew the contract.

The language of the grant by appellant to Bullock & Company is the "exclusive right" for the "period of thirty years" to "erect," "maintain" and "operate" a system of

waterworks. Counsel for appellant contend that these words, taken together, are,

"in effect, a grant of the right to supply water, and the phrase, 'erect, maintain and operate,' was merely adopted as a means of expressing the intention of the parties with the usual legal tautology and in the customary legal cant."

We take it that counsel intend to assert that the words erect," "maintain" and "operate," as used in the franchise, are equivalents or appositives, as if written "erect," "maintain" or "operate." But the language will not bear this construction. These words, being connected by the conjunction "and," are necessarily co-ordinate, distributive and additive. Of course, there was but one grant, and it was single and indivisible. That has never been disputed. The point at issue is as to what was included in that grant. Appellant contends that nothing more than the "right to supply water," and appellee contends that the right to supply water was merely the inducement for the grant, but not the thing granted; that the thing actually granted was the exclusive use for thirty years of the streets, alleys and other public places to "erect," "maintain" and "operate" water works. The three words do not designate three separate grants; they simply mark the extent of the one grant. Erecting a waterworks is altogether different from maintaining, and operating is likewise different from erecting or maintaining. By the term "erecting" is meant the actual building of the works; "maintaining" designates the keeping up or repairing of the works after having been built; and "operating" is the furnishing of water through the works after the same have been built, and while being maintained. The three are required to designate the whole use of the

streets given to Bullock & Company by the franchise. We submit that there is neither "tautology" nor "customary legal cant" in the wording of the franchise, but that, on the contrary, the language used is peculiarly apt and appropriate. It cannot be that the appellant intended to grant merely the right to "supply water," as contended by appellant, because Bullock & Company, as all other persons, possessed that right independent of a public franchise. The appellant had no right to say to Bullock & Company, or any one of these: You shall not engage in the public water-supply business; but it did have the right to say: You shall not use the public streets for that purpose, because, under its charter, it was vested with the control of the streets and the uses to which they might be put. If Bullock & Company could have carried on the business without using the streets, the grant would have been unnecessary. It was in view of this fact that the franchise was made to provide that Bullock & Company shall have, not the exclusive right to supply water, but the exclusive use of the public streets, alleys, etc., "for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water" to appellant and its inhabitants.

Analyzing the language of the grant further, we observe that "right and privilege" are modified by the word "exclusive," thus giving to Bullock & Company the sole or undivided right to use the streets for the purposes named. We also observe that "right and privilege" are further modified by the phrase "for the period of thirty years," thus making the entire or unit grant continuous for that period. The terms employed, therefore, vested in Bullock & Company the exclusive use of the streets for thirty years to erect, maintain and operate waterworks.

Appellant admits that the right to "maintain" and "operate" is exclusive throughout the full period of thirty years, but argues that the right to "erect" is not exclusive throughout the entire thirty-year period; but that the appellant may enter the streets at any time to erect works of its own, provided it does not propose to operate such works until after the end of the thirty years. Certainly, the ordinary meaning of the words used and the ordinary grammatical construction do not warrant such conclusion. The grant may be likened to a tripod, having for its feet "the right to erect," "the right to maintain" and "the right to operate." The construction contended for by appellant would cut short one of the legs of the tripod by permitting appellant to construct a waterworks within the thirty-year period. This is against the plain letter of the franchise, and, as we see it, is not warranted by any canon of construction. Counsel for appellant support their argument for amputating one leg of the tripod on the ground that otherwise the appellant would at the end of the franchise be unable to provide a continuous supply of water unless it should purchase appellee's plant, and in this way a mere option to purchase would be equivalent to an obligation to do so. If the conclusion were correct, which it is not, it would not make the argument conclusive.

Considering the language of the franchise literally, the utmost effect against appellant is to deprive it of the right to construct new waterworks prior to the termination of the franchise. It would still have the right to enter into a contract with appellee or his successors. It would also have the right to regulate the rates so as to require the water to be furnished at reasonable rates. It would still have the right to build new waterworks after the termination of the franchise. The only possible contingency averse to

appellant would be for appellee to refuse to furnish water at all, and this contingency is covered by a further provision in the franchise, paragraph 9, which provides as follows:

"SEC. 9. At the expiration of each period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said waterworks. * * *

"The value of said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one person, the two appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the values of said system of waterworks. None of the board shall be residents of the said Warren County."

As we have said (above) in discussing this same right, it gives to the city something of value that it would not possess except for the contract.

Suppose the franchise had been *exclusive* to "operate and maintain" a waterworks for thirty years. Could not the city then legally set up the claim that the water company did *not* have the exclusive right to "erect" a waterworks, and that it could "erect" one, provided it did not operate it during the life of the franchise? This proposition cannot be disputed. Thus, it necessarily follows that the word "erect" means something more than the right to "operate and maintain." This, we think, *demonstrates* that our contention that the word "erect" means something more than to "operate and maintain." If it does mean *more*, then it should be enforced to the *letter*, because that is the

letter of the contract; and this Court has held that the contract is exclusive as against the city; that the city had the power to make the contract *exclusive* against itself.

III.

AS TO ESTOPPEL.

It is not pretended that appellee did any positive act upon which the supposed estoppel is predicated. All that is claimed is that the water company and its receiver sat by in silence while the city laid the mains in question. The city was enjoined from erecting waterworks prior to November 18, 1916, under the decree in Suit 41, and was thereby perpetually estopped from setting up such right. Nevertheless, it now seeks to avoid its own estoppel by pleading a counter estoppel against appellee, which, we submit, cannot be done.

The judgment, decree and mandate in No. 41 was of record. Whatever appellant did by way of laying water mains, it did with actual knowledge and at its peril, as it was a party to said suit.

The Supreme Court of the United States, in *Sturm vs. Boker*, 150 U. S. 112, clearly presented the law relating to the subject-matter of estoppel:

"Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible

for the loss it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

In *Bloomfield vs. Charter Oak National Bank*, 121 U. S. 121; 30 L. Ed. 923, this Court said:

"Upon the whole case there was no proof * * * of estoppel to bind the defendant town; * * * because there was no evidence of any acts of the town, which the plaintiff had a legal right to rely upon, or did, in fact, rely upon."

Even so, in the case at bar there is no act of the defendant pleaded or argued which could in contemplation of law give the city a legal right to believe the appellee had waived the injunction decreed in his favor in Suit 41, nor is it even pretended that the city did, as a matter of fact, rely on any such waiver when it laid the water mains and incurred the expense in question.

In *Bryant vs. Virginia Coal and Iron Company*, 3 Otto 326; 23 L. Ed. 927, in discussing the doctrine of estoppel, the Court said:

"It is difficult to see where the doctrine of estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which, in effect, implies fraud.' And, therefore, when

the circumstances of the case repel any such interference, although there may be some degree of negligence, yet Courts of equity will not grant relief."

* * *

"Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In *Meridian Waterworks vs. Meridian*, 85 Miss. 515, the Supreme Court of Mississippi, in considering the question of estoppel in a case quite similar to the case at bar, said:

"We find nothing in the contention that a waiver amounting to an estoppel grows out of the city authorities allowing, or even ordering additions and improvements to be made after suit was brought. If there had been no agreement concerning this matter, appellant had full notice of the pendency of the proceedings to cancel the contract, and any improvement made thereafter could not be pleaded or taken advantage of to defeat an accrued right, or as an atonement for wrongs committed prior to the institution of the suit then pending. As to the extensions and improvements made after the suit was brought, appellant was a volunteer."

Under the authorities quoted above, the case at bar falls short of many of the essential elements of estoppel.

Nothing was done by complainant to deceive the defendant as to any legal right or to lead it to believe that he did not rely on the injunction in Suit 41 against the city's erecting a waterworks. The city does not claim that it was induced to lay the mains in question by reason of anything done by defendant, or even by defendant's silence. Its only contention is that the defendant having observed that it

was laying mains, failed to notify it that he objected, and would before the completion of the works take action to stop it. If all this were true, which it is not, it would fall far short of working an estoppel against appellee.

Again, it is not pretended that the city did not have the same knowledge of the decree in Suit 41 as the appellee. If it did, there can be no estoppel. Equal knowledge precludes an estoppel.

The fact that, after the filing of the original bill in this cause and almost immediately preceding the final hearing of the cause, the city was again advertising for bids to lay mains, and had to be enjoined from letting contracts therefor, conclusively shows that the moving cause was not the silence of the appellee. The city was now fully advised of the opposition of appellee by the contents of his bills of complaint, yet it endeavored as before to lay additional mains.

There is no element of injury to the city, which is essentially the basis of every effectual estoppel. Should the city build its own works, even after the franchise is at an end, it can use the mains already laid. It does not now propose to use them earlier than that time; hence, whether it be given the right to build now, as it contends for, or be required to wait until that time, can make no difference to the city.

In *Missouri vs. Illinois, etc., Disc't.*, 180 U. S. 208, the Court said:

"The State of Missouri, by acquiescing in the proceedings of the sanitary district of Chicago in devising and carrying out its sewerage system, is not estopped from seeking relief against the pouring of sewerage and filth through a drainage channel into the Mississippi River, to the detriment of the State of Missouri and her inhabitants. The State of Mis-

souri did not in any way encourage the adoption of that system, or by any act or word induce the city authorities to so direct the sewers that the flow from them should reach that State."

The appellant in the 7th assignment of error assigns that

"said Circuit Court of Appeals erred in not holding that appellee was estopped to assert that appellant has not the right to build a waterworks system of its own before the expiration of said franchise."

The appellant argues the question of estoppel in its brief on the merits, pages 66 to 69.

We respectfully submit that the appellant *did not* assign the ground for estoppel to the Circuit Court of Appeals. (See Rec., p. 240.)

Therefore, the Circuit Court of Appeals could not consider it under its rules (except the Court may consider a plain error not assigned), *but it did not do so*; and, therefore, it is **not a proper assignment of error** to this Court.

It cannot be assigned as error from that Court when it *was not* before the Court.

The appellant in its statement of fact, on pages 4 and 5, says:

"The city on the *first day of January, 1912*, declared its purpose and intention to construct a system of waterworks of its own, to be operated only after the expiration of said franchise, and to that end it called an election," etc.

The election was held on February 14, 1912, and on March 2, 1912, the receiver commenced the present suit. It

will thus be seen there was no time lost after the city had "*declared its purpose and intention*" to build, etc.

IV.

The legality of the bond issue is not before the Court in this appeal, and hence not argued.

We shall not argue the question of the legality of the bond issue because we do not conceive that question to be before the Court for adjudication. It was not decided by the District Court because he did not consider it necessary to be decided, but counsel for appellant, on page 91 of their brief, say: "but it (the decree) specifically enjoins it (appellant) from issuing the bonds which were authorized at the election held shortly before the bill was filed." This is an erroneous statement of fact, which we challenge on account of its bearing on the finality of the decree of the District Court. The words of the decree are (Rec. 205): "It is further ordered and decreed that the defendant (appellant here) * * * be and is hereby enjoined from disposing of the issue of four hundred thousand dollars of *bonds with a view of constructing a water works system, or any part thereof, in said city during the life of said franchise, that is, between now and the 18th day of January, 1916.*" This relief is necessarily predicated on appellee's rights under the Bullock franchise. He was entitled to it whether the bond election was valid or not. It is to be further noted that the words of the decree do not injure the sale of the bonds except conditionally—*i. e.*, with a view of constructing waterworks prior to the termination of the franchise. It gives him no relief as a taxpayer because it does not declare the election void, nor does it decide anything against him as a taxpayer, because it does not

declare the election valid. If the decree itself be open to doubt as to whether any relief was given appellee as a taxpayer, the opinion of the District Judge may be looked to, because he expressly says that he considered no question but *res adjudicata* (Rec. 210, paragraph next last). The bond election could not affect what was decided in Suit 41, except it transgress the prohibition against building waterworks. This it did, and to that extent action under it was enjoined. This, however was entirely apart from the question of its validity of the election, and to any right he may have possessed as a taxpayer.

V.

The judgment below in favor of the appellees should be affirmed in all respects, with costs in all the courts.

Respectfully submitted,

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